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Curtis Chipman and Fay Chipman v. Janice Miller, Dana Anderson, and Kim Anderson : Brief of Appellant

Utah Court of Appeals

Craig M. Snyder; Leslie W. Slaugh; Howard, Lewis and Petersen; Attorneys for Appellees.
Gordon Duval; Jeff Buhman; Duval, Hansen, Witt and Morley; Attorney for Appellants.

IN THE UTAH COURT OF APPEALS
IN AND FOR THE STATE OF UTAH

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiffs-Appellants, vs. JANICE MILLER, DANA ANDERSON and KIM ANDERSON, Defendants-Appellees.	Case No. 960194-CA Oral Argument Priority 15

BRIEF OF APPELLANTS

APPEAL FROM THE FINAL DECREE OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY,
THE HONORABLE GUY R. BURNINGHAM, JUDGE

GORDON DUVAL, Bar No. 6532
JEFF BUHMAN, Bar No. 7041
DUVAL, HANSEN, WITT & MORLEY
110 South Main Street
Pleasant Grove, Utah 84062

ATTORNEYS FOR APPELLANTS

CRAIG M. SNYDER, Bar No. 3033
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 778
Provo, Utah 84603

ATTORNEY FOR APPELLEES

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TABLE OF AUTHORITIES

Cases Cited:

Statutes and Rules Cited:

Treatises Cited:

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JURISDICTION

Jurisdiction is conferred on this Court pursuant to Utah Constitution Art. VIII § 3, Utah Code Ann. § 78-2-2(3)(j), and Utah R. App. P. 3 and Utah R. App. P. 4.

STATEMENT OF ISSUES

1. Was it error for the trial court to award attorney's fees pursuant to Utah Code Ann. § 78-27-56 (the bad faith statute) to defendants, the non-prevailing parties, based on an interpretation of Utah Code Ann. § 78-40-3 (the quiet title statute) that would define "costs" to include "attorney's fees"? The trial court's findings of fact as to bad faith may be reversed only if clearly erroneous. Utah R. Civ. P. 52(a); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989). The trial court's determination that defendants' claim had merit should be reviewed for correctness as a matter of law. Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991); see also Bellon v. Malnar, 808 P.2d 1089, 1092 (Utah 1991). This issue was preserved at the trial

court level in the Plaintiffs' Notice of Objections to the Proposed Order and Judgment. (R. at 135.)

2. Was it error for the trial court to withhold an award of attorney fees from the prevailing party pursuant to the bad faith statute when the non-prevailing parties never had, asserted, or claimed a basis in law or in fact for their legal or factual position and nevertheless took affirmative actions to take advantage of the prevailing parties and to hinder and delay the prevailing parties' enjoyment of a clear and undisputed right? The trial court's findings of fact may be reversed only if clearly erroneous. Utah R. Civ. P. 52(a); Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899 (Utah 1989). The trial court's finding under the bad faith statute that plaintiffs' claim was without merit should be reviewed for correctness as a matter of law. Jeschke v. Willis, 811 P.2d 202 (Utah Ct. App. 1991); see also Bellon v. Malnar, 808 P.2d 1089, 1092 (Utah 1991). This issue was preserved at the trial court level in the Plaintiffs' Notice of Objections to the Proposed Order and Judgment. (R. at 135.)

DETERMINATIVE STATUTES AND CASES

Utah Code Ann. § 78-27-56; Utah Code Ann. § 78-40-3; Cady v. Johnson, 671 P.2d 149 (Utah 1983); Highland Constr. Co. v. Stevenson, 636 P.2d 1034 (Utah 1981); Tholen v. Sandy City, 849 P.2d 592 (Utah Ct. App. 1993).

STATEMENT OF THE CASE

A. Nature of the Case. Plaintiffs appeal from a final judgment on the parties' cross-motions seeking an award of

attorney's fees. Defendants were awarded $484.00 against plaintiffs for attorney's fees (R. at 129.) Plaintiffs' request for attorney's fees was denied. (R. at 129.)

B. Course of Proceedings and Disposition Below. Plaintiffs filed a complaint against the defendants seeking a court order quieting title to real property in plaintiffs and requiring defendants to pay plaintiffs' reasonable attorney's fees if any of the defendants asserted a meritless defense to the action. (R. at 2, 6.) Forty-one days later, defendants filed answers, counterclaims for attorney's fees, and requests for Rule 11 sanctions. (R. at 16, 21.) After briefing, but without an evidentiary hearing, the trial court entered a proposed ruling denying plaintiffs' motion for attorney's fees and granting defendants' motion for attorney's fees. (R. at 129.) Plaintiffs filed an objection to the proposed order and judgment and requested a hearing. (R. at 138, 140.) At the October 5, 1995, hearing, the trial court declined to alter its previous ruling but did explain the reasoning it used to arrive at its ruling. (R. at 142.) The court signed and filed the judgment, order and findings. (R. at 155.) On December 12, 1995, plaintiffs filed a notice appealing the trial court's order and judgment. (R. at 160.)

C. Statement of Facts. This case originally involved a boundary line dispute between plaintiffs and defendant Janice Miller (hereafter "Defendant Miller") and defendants Kim and Dana Anderson (hereafter "Defendants Anderson"). The Andersons are the daughter and son-in-law of Defendant Miller and acquired from

Defendant Miller property adjacent to plaintiffs' property. Plaintiffs and Defendant Miller have been neighbors and adjoining landowners for many years. The boundary line between their properties has been marked by a fence and hedge (hereafter "the fence") that have continually existed, unmoved, for over twenty years. (R at 4, 5.) This boundary line, marked by the fence, is slightly different than the boundary line described in historical deeds (which put the boundary line a few feet over onto plaintiffs' land). However, both plaintiffs and defendants, as well as their predecessors in title, have always acquiesced to and recognized the fence as the boundary between their properties. (R. at 4, 19.) In fact, Defendant Miller has executed deeds and filed subdivision plat maps in which she acknowledged the fence as the boundary line. (R. at 4, 31, 42, 46, 48.)

In 1994, plaintiffs began subdividing parts of their property. (R. at 73.) At the June 15, 1994, American Fork City Planning Commission meeting, plaintiffs sought final plat approval on a subdivision which included their property adjacent to the fence. (R. at 64.) However, Defendant Miller appeared at that meeting and asserted an interest in the plaintiffs' property adjacent to the fence, thereby causing the city to deny approval for plaintiffs' subdivision and building permits. (R. at 64.) After the meeting, plaintiff Curtis Chipman provided Defendant Miller a copy of a recent newspaper article which cited Staker v. Ainsworth, 785 P.2d 417 (Utah 1990), and explained the Utah Supreme Court's decision that a boundary line will stand under the rule of

boundary by acquiescence if a fence line between two pieces of property has existed for many years and no one has challenged its location. (R. at 63, 84, 85.) "Old Fences Describe Boundaries," The Daily Herald, 1990.

The following month, in order to resolve the dispute, plaintiffs retained an attorney. In the attorney's file memo he states:

> I met with Jan Miller this morning for a little over two hours. We went over the plats. At first, her attitude was that she wanted $8,000.00 from Curtis Chipman if he wants a Quit-Claim Deed to that property. She says, however, that she does not intend to disturb the present fence line, but if he wants a record title to his property he is going to have to pay something for it.

(R. at 62, 119.)

The plaintiffs later retained a new attorney, the undersigned counsel, who sent to Defendant Miller, but not to Defendants Anderson, a letter which stated in relevant part:

> Curtis and Fay Chipman have asked that I represent them in their efforts to obtain clear title to the property within their fence line and along their boundary. I understand there have been some communications with you regarding this and that you insist on being paid for the land within their fence line. I have attached a case decided by the Utah Supreme Court of Appeals just a few weeks ago that clearly establishes that the Chipmans are entitled to the property within their fence line and they do not need to buy it from you. This is because the fence line has created a situation known as "boundary by acquiescence." That fence has been there as long as anybody can remember and has been treated as the boundary for decades. The Carter case that I have attached explains more fully why the Chipmans are entitled to the land within their fence line without payment. There are many other Utah cases that stand for the same proposition. If necessary the Chipmans will pursue their legal rights in the courts. I feel confident they will prevail if they are required to

> pursue that action. However, neither they nor I wish to take such drastic action unless it is absolutely necessary. They would much prefer to resolve this matter through conversation. To that end, please give me a call at 785-5350 so we can set up an appointment to get this matter resolved. If you have an attorney, I would encourage you to make him aware of this situation. If the Chipmans are forced to litigate this matter, it is very likely the court would require you to pay the Chipmans' attorney's fees. Please respond by December 18, 1994, so we can get this matter resolved in as cordial a way as possible. I am looking forward to hearing from you.

(R. at 61.)

The next month, plaintiffs sent to Defendant Miller and Defendants Anderson another letter. This was the first letter sent to Defendants Anderson. (R. at 56.) In relevant part, that letter states:

> I am enclosing the original quit-claim deed resolving the boundary dispute between you and the Chipmans. I strongly urge you to sign the deed and deliver it to Mountain West Title Company, 871 South Orem Boulevard, Orem, Utah, no later than January 13, 1995. I have met with you and understand your position in this matter. I have extensively reviewed legal documents, deeds, and plats relating to the disputed land area and I have come to the conclusion that it is unreasonable for you to delay signing any longer. I believe any arguments you may raise in defense to this case would be frivolous. I understand you may not agree with my characterization of the case. However, I believe the following documents set forth in chronological order will explain how I arrived at that conclusion.

(R. at 56.) This letter identified a number of deeds which Defendant Miller had signed acknowledging the fence line as the properties' boundary. (R. at 31, 46, 48.) The letter notified all defendants that they needed to respond by January 13, 1995 or plaintiffs would "immediately commence litigation." (R. at 53, 56.) Defendants Anderson were named in this letter (and not the

first) because Defendant Miller had asserted that Defendants Anderson needed additional footage for their property beyond the fence line and would therefore not sign a quit-claim deed. (R. at 71.) However, Defendants Anderson did not respond to the letter. (R. at 71.)

Plaintiffs determined that the only way they were going to obtain clear title to their property was by commencing litigation. (R. at 71.) Plaintiffs filed their complaint on March 8, 1995. On March 28, 1995, defendants' attorney called plaintiffs' attorney and requested additional time to answer the complaint. Plaintiffs' attorney gave defendants' attorney his first extension to file an answer. (R. at 40.) On April 3, 1995, defendants' attorney called plaintiffs' attorney and indicated Defendant Miller would sign a quit-claim deed if plaintiffs would remove the hedge that had served as part of plaintiffs' property boundary for more than five decades. (R. at 70.) Defendants' attorney also stated that Defendants Anderson did not claim an interest in property north of the fence line. (R. at 25, 26.) He stated he would mail plaintiffs' attorney a letter explaining Defendants Anderson's and Miller's position. (R. at 25.) On April 5, 1995, plaintiffs' attorney faxed to defendants' attorney a document showing plaintiffs' hedge was in compliance with local ordinances. (R. at 39.) The fax cover letter stated:

> If you will confirm in writing that Dana and Kim Anderson do not claim an interest in property north of the fence line between Andersons and Chipmans, then I will gladly prepare an order dismissing Dana and Kim from the lawsuit. As to Jan Miller, please

> answer on her behalf by close of business on Wednesday, April 5, 1995.

(R. at 38, 39.) In the fax plaintiffs' attorney granted the defendants a second extension of time to file their answer. (R. at 38, 39.)

On April 7, 1995, plaintiffs' attorney faxed defendants' attorney another quit-claim deed because defendants' attorney said he did not have a suitable deed. (R. at 36, 37.) In the fax plaintiffs' attorney also stated, "We still need to talk about attorney's fees." (R. at 36, 37.)

On April 14, 1995, nine days after the second extension deadline for filing an answer, Defendant Miller still had not filed an answer to the complaint nor had she provided plaintiffs with a quit-claim deed. Therefore, after discussions with defendants' attorney, plaintiffs' attorney faxed to defendants' attorney a note granting a third extension of time. The note stated as follows:

> I have not yet received the letter you mentioned or the signed quit-claim deed. I will need to file a default judgment against Jan Miller on 4/18/95. I will not file the default judgment against the Andersons based on your representation that you will confirm in writing that the Andersons do not assert an interest in Chipmans' property.

(R. at 34, 35.) Defendants' attorney responded with a letter confirming that Defendants Anderson would not be asserting ownership interest in property north of the fence line. (R. at 33.) However, the letter also noted that getting a quit-claim deed from Defendant Miller was not a "done deal." The letter stated Defendant Miller's attorney would "endeavor to have her sign that quit-claim deed to comply with your deadline." (R. at 33.)

On April 18, 1995, at approximately 11:00 a.m., defendants' attorney called plaintiffs' attorney to advise that Defendant Miller had signed a quit-claim deed. (R. at 69.) He also insisted that plaintiffs not require Defendant Miller to file an answer. (R. at 69.) At 2:08 p.m., and for the third time in writing, plaintiffs' attorney advised defendants' attorney by fax that Defendants Anderson did not need to file an answer and, for the fourth time in less than a month, plaintiffs granted Defendant Miller an extension of time to file her answer. (R. at 29.)

Two and one-half hours later, at 4:34 p.m., in spite of being informed three times in writing that Defendants Anderson did not have to file an answer, Defendants Anderson filed an answer and affirmatively sought recovery of their attorney's fees. (R. at 21.) Additionally, after plaintiffs had granted her four extensions of time, and after being told she did not yet have to file, Defendant Miller filed an answer and affirmatively sought recovery of her attorney's fees. (R. at 16.)

Citing Utah Code Ann. § 78-40-3, the trial court denied plaintiffs' motion for attorney's fees. (R. at 129). Having determined that plaintiffs' motion for attorney's fees was meritless, the trial court then awarded defendants attorney's fees pursuant to Utah Code Ann. § 78-27-56. (R. at 129.)

SUMMARY OF ARGUMENT

It was error for the trial court to award attorney's fees to the defendants pursuant to the bad faith statute, Utah Code Ann. § 78-27-56. The defendants were not prevailing parties in the

underlying dispute and therefore were not entitled to attorney's fees under the bad faith statute. The trial court further erred in interpreting the quiet title statute, Utah Code Ann. § 78-40-3, as precluding an award of attorney's fees and thereby ruling that plaintiffs' claim for attorney's fees was without merit. The language of the quiet title statute, which in certain circumstances prohibits an award of "costs," should not have been interpreted by the trial court as prohibiting an award of "attorney's fees" as well as prohibiting "costs." In addition, there was no evidence presented to the trial court to suggest, much less prove, that plaintiffs' claim was brought or asserted in bad faith.

It was also error for the trial court to deny plaintiffs' claim for attorneys' fees pursuant to the bad faith statute. Because plaintiffs obtained the object of their lawsuit, they were the prevailing parties in the underlying dispute. Furthermore, plaintiffs are entitled to attorney's fees under the bad faith statute because Defendant Miller's claim to plaintiffs' property was without merit. Plaintiffs had a clear and undisputed right to the use and enjoyment of their property up to the fence line. Additionally, Defendant Miller's claim to plaintiffs' land across the fence line was made in bad faith. She made her claim to plaintiffs' property with the intent to force plaintiffs to pay money for land she had repeatedly acknowledged was rightfully theirs and with knowledge that the assertion of her claim would hinder and delay the approval of plaintiffs' applied-for permits.

The court should include in its award the attorney's fees incurred by plaintiffs prior to filing suit, which were incurred as a result of defendants' bad faith assertion and maintenance of a meritless claim.

ARGUMENT

I. IT WAS ERROR FOR THE TRIAL COURT TO AWARD ATTORNEY'S FEES TO THE DEFENDANTS PURSUANT TO THE BAD FAITH STATUTE.

In pertinent part, the bad faith statute states: "In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." Utah Code Ann. § 78-27-56. Because the defendants were not prevailing parties in the underlying dispute, they are not entitled to attorney's fees under the bad faith statute.

Black's Law Dictionary gives an excellent statement of the general rule and the definition of the term "prevailing party":

> The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. . . . To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who made a claim against the other, has successfully maintained it.

Black's Law Dictionary, 6th Ed., p. 1168 (West 1990).

In Highland Constr. Co. v. Stevenson, 636 P.2d 1034 (Utah 1981), the plaintiff, Highland Construction, claimed attorney's fees under Utah Code Ann. § 14-1-8 (1953) (repealed by Laws 1980, ch. 75 § 5), which provided attorney's fees to the prevailing party. Highland claimed to be the prevailing party because five and one-half months after filing suit the defendant, Stevenson, admitted that he owed Highland and voluntarily paid Highland a portion of the amount claimed in Highland's complaint. The Utah Supreme Court affirmed the award of attorney's fees to Highland,

stating that "[i]n view of that payment after the action was started, Highland was 'the prevailing party' with regard to that cause of action." Id. at 1037. The Highland court also stated that Highland was the prevailing party because:

> It should make no difference whether the plaintiff recovers money from the defendant during the course of the action by voluntary payment or whether the plaintiff recovers that amount by a judgment. In both instances the plaintiff has recovered money by virtue of its action.

Id. at 1037 (citations omitted).

Similarly, in Scatcherd v. Love, 166 F. 53 (6th Cir. 1908), a federal court found that a defendant could not be considered the successful party after he had acknowledged his liability to the plaintiff by paying the claim upon which he was sued, prior to judgment. Instead, the court concluded that the plaintiff was the successful party because his suit had brought about a satisfaction of his claim against the defendant.

In the case now before this Court, plaintiffs filed a complaint in order to obtain clear title to their property. (R. at 6.) In their answers, defendants admitted every substantive allegation contained in the complaint. (R. at 16, 21.) After answering, Defendant Miller also signed a quitclaim deed and Defendants Anderson provided a document admitting they had no interest in the property. (R. at 91.) None of the defendants prevailed on any claim or issue. In fact, they did not even obtain a dismissal of the action. They settled plaintiffs' claim by Defendant Miller delivering a deed to the disputed property and Defendants Anderson delivering a document verifying they claimed no

interest in the property. Thus, after plaintiffs filed the complaint the plaintiffs obtained clear title to their property, the object of their suit. By awarding attorney's fees to the defendants, the trial court awarded attorney's fees to the losing party.

Nonetheless, the trial court apparently reasoned that defendants were the prevailing party because they were successful on their motion for attorney's fees. (R. at 165, 166.) However, the court's reasoning was circular and unsound. In both essence and fact, the trial court found that defendants were the prevailing party because the court was awarding them attorney's fees, and the court awarded defendants attorney's fees because the court found they were the prevailing party.

It is a misapplication of the bad faith statute to apply its penalty against a party for filing an unsuccessful motion for attorney's fees. If the trial court's intention was to discourage the filing of frivolous motions (which plaintiffs' motion was not), it applied the wrong law. The court rules have clearly provided for relief from the filing of frivolous motions of virtue of Utah R. Civ. P. 11.

A plain reading of the bad faith statute makes evident the conclusion that the statute requires the party seeking attorney's fees to prevail on some claim or issue other than its bad faith motion. At a minimum, before awarding attorney's fees under the bad faith statute, courts should require a finding that the moving party has obtained some substantive relief in its favor.

Accordingly, this Court should reverse the trial court's determination that defendants were the prevailing party in the underlying dispute and its award of attorney's fees to defendants.

A. The language of the quiet title statute, which in certain circumstances prohibits an award of "costs," should not have been interpreted by the trial court as prohibiting an award of "attorney's fees" as well as prohibiting "costs."

The quiet title statute states: "If the defendant in . . . [a quiet title] action disclaims in his answer any interest or estate in the property, or suffers judgment to be taken against him without answer, the plaintiff cannot recover costs." Utah Code Ann. § 78-40-3 (emphasis added). The trial court apparently misinterpreted "costs" to include attorney's fees. The quiet title statute does not prohibit attorney's fees.

The long-settled distinction between costs and attorney's fees is aptly made in the definition of "costs" found in Black's Law Dictionary: "Generally, 'costs' do not include attorney fees unless such fees are by a statute denominated costs or are by statute allowed to be recovered as costs in the case, Black's Law Dictionary, 6th Ed., p. 346 (West 1990).

It is well-settled in Utah that courts do not read "costs" to include attorney's fees. See, e.g., Tholen v. Sandy City, 849 P.2d 592 (Utah Ct. App. 1993); World Peace Movement of America v. Newspaper Agency Corp., 879 P.2d 253 (Utah 1994); Cluff v. Culmer, 556 P.2d 498 (Utah 1976). Thus, the trial court's interpretation of the quiet title statute as prohibiting awards of attorney's fees was clearly incorrect.

B. No evidence was presented to the trial court to suggest, much less prove, that plaintiffs' claim was brought or asserted in bad faith

In the present case, the trial court found that plaintiffs' claim for attorney's fees under the bad faith statute was not asserted in good faith. (R. at 170.) Apparently, the trial court was of the opinion that the quiet title statute's prohibition of awarding costs also prohibited an award of attorney's fees, and therefore any claim brought for attorney's fees under the quiet title statute was, by definition, made in bad faith.

As evidenced by the arguments presented herein, plaintiffs not only had sufficient legal and factual bases for their claim for attorney's fees but also had ample case and treatise authority in support of that claim. The arguments presented in Section I.A, support plaintiffs' position that a plain reading of the quiet title statute would not prohibit their claim for attorney's fees. Accordingly, plaintiffs had no reason whatsoever to suspect that their claim for attorney's fees pursuant to the bad faith statute was in any way precluded by the quiet title statute. Plaintiffs brought their claim with an honest belief it was appropriate and well-founded in law and fact, and without any intent to hinder, delay, defraud or take advantage of defendants, and defendants presented absolutely no evidence to the contrary. Other than the actual cross-motion for attorney's fees filed by the Plaintiffs, there is no evidence to marshall that shows the Plaintiffs were acting in bad faith. Therefore, the decision of the trial court should be reversed.

II. IT WAS ERROR FOR THE TRIAL COURT TO DENY PLAINTIFFS' CLAIM FOR ATTORNEYS' FEES PURSUANT TO THE BAD FAITH STATUTE.

In pertinent part, the bad faith statute states: "In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith." Utah Code Ann. § 78-27-56.

A. Because plaintiffs obtained the object of their lawsuit, they were the prevailing party in the underlying dispute.

The general rule and definition of the term "prevailing party" have been discussed previously in Section I. In the case now before this Court, plaintiffs filed a complaint in order to obtain clear title to their property from claims asserted by the defendants. After they filed the complaint, plaintiffs obtained the necessary quit-claim deed from Defendant Miller and acknowledgment from Defendants Anderson of their lack of interest in the property. Accordingly, plaintiffs obtained the object of their lawsuit. Plaintiffs were the prevailing party because their suit brought about a satisfaction of their claim against the defendants. See Scatcherd v. Love, 166 F. 53, 56 (6th Cir. 1908). Thus, "at the end of the suit" plaintiffs were "the party who made a claim against the other, [and who] . . . successfully maintained it." Black's Law Dictionary, 6th Ed., p. 1168 (West 1990). See also Highland Constr. Co. v. Stevenson, 636 P.2d 1034 (Utah 1981).

At the October 5, 1995, hearing the trial judge stated, ". . . I wouldn't award attorney fees to you [plaintiffs] as a prevailing party because you didn't have to fight for it [the

object of plaintiffs' lawsuit] very hard, and that is what the statute says." (R. at 168.) The trial court apparently ruled that, based on Utah Code Ann. § 78-40-3, the plaintiffs didn't prevail in the underlying dispute because plaintiffs obtained from defendants the object of their suit shortly after filing their complaint and prior to any rulings from the court. The trial court had no basis for this ruling. The prevailing party is the party which wins the object of its suit, not the party who fought the hardest. It the trial court's concern was with awarding attorney's fees to a party who didn't have to fight much in order to prevail (although that concern was completely unfounded in this case), that concern is adequately addressed by the discretion granted to the trial court to set the amount of attorney's fees it awards under the bad faith statute.

Plaintiffs recognize that before a court awards attorney's fees under the bad faith statute it should require a finding that the moving party has obtained some substantial relief in its favor, whether that be a favorable verdict, a default judgment, a dismissal, or a beneficial settlement. In the present case, plaintiffs obtained a beneficial settlement and were therefore the prevailing party. Accordingly, the trial court's ruling denying plaintiffs an award of attorney's fees should be reversed.

B. Defendant Miller's claim to plaintiffs' land across the fence line was made in bad faith. She made that claim with the intent to force plaintiffs to pay money for land she had repeatedly acknowledged was rightfully theirs and with knowledge that the assertion of her claim would hinder and delay the approval of plaintiffs' applied-for permits.

In Cady v. Johnson, 671 P.2d 149 (Utah 1983), the Utah Supreme Court defined good faith as having (1) an honest belief in the propriety of the activities in question; (2) no intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will, hinder, delay or defraud others. Id. at 151. To establish lack of good faith, a party must prove that one or more of these factors is lacking. Sparkman and McLean Co. v. Derber, 481 P.2d 585 (Wash. Ct. App. 1971).

In the present case, at least two of these factors -- and most likely all three -- were lacking in the actions of Defendant Miller. Defendant Miller acted with intent to take unconscionable advantage of plaintiffs by forcing them to pay money for land that she acknowledged was rightfully theirs. (R. at 62, 64, 119.) When Defendant Miller intentionally prevented plaintiffs from obtaining a building permit, thereby interfering with plaintiffs' right to build upon their land, she also acted with knowledge of the fact that the activities she was undertaking would "hinder, delay or defraud" plaintiffs. (R. at 64.) Defendant Miller even verbally threatened plaintiffs that she would prevent them from selling their property. She told Plaintiff Fay Chipman that if plaintiffs didn't pay her $12,000.00 for the land, she would "see that [they would] never sell a bit of that ground." (Affidavit of Fay Chipman, R. at 83, 85.) Defendant Miller used the fence as the boundary when it was to her advantage, such as when she was subdividing and deeding property. When it was to her advantage to

not use the fence as the boundary line, as when she attempted to coerce money from plaintiffs, Defendant Miller claimed ownership of property beyond the fence.

Even after plaintiffs, their developer consultant, and two different attorneys explained the facts and the law to Defendant Miller, she refused to act reasonably. Defendant Miller's actions have been characterized as "self-induced myopia" (see R. Gerard Lutz, Attorney's Fees in Bad Faith, Meritless Actions, 1984 Utah L. Rev. 593, 607) and confirm that Defendant Miller lacked an honest belief in the appropriateness of her actions. By requiring plaintiffs to file a lawsuit before she would agree to convey the quit-claim deed, Defendant Miller was "stubbornly litigious." See American States Ins. Co. v. Walker, 486 P.2d 1042 (Utah 1971). The actions taken by Defendant Miller were intended "to harass the plaintiffs and force the plaintiffs to expend money on counsel." Lutz, supra, at 601 n.85.

The only possible reason for Defendant Miller's myopia, obduracy, and stubbornly litigious actions were to unconscionably harass the plaintiffs into paying her money. Her claim of interest in plaintiffs' property was therefore asserted and maintained in bad faith, and the trial court's award of attorney fees to defendants should be reversed.

C. Plaintiffs had a clear and undisputed right to the use and enjoyment of their property up to the fence line, and defendants' claim to plaintiffs' property was therefore without merit.

A claim is without merit if it is "frivolous" or "of little weight or importance having no basis in law or fact." Jeschke, 811

P.2d at 203; Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983). A claim having no basis in law or fact is without merit, but is nevertheless in good faith so long as there is an honest belief that it is appropriate and so long as there is no intent to hinder, delay, defraud or take advantage of another. Cady, 671 P.2d at 151.

Plaintiffs had a clear right, under the doctrine of boundary by acquiescence, to the use and enjoyment of their property up to the fence line. From the very outset of this dispute, no one has claimed that the fence and hedge line had not continuously existed, unmoved, for over twenty years. No one has disputed that plaintiffs, defendants, and their predecessors in interest recognized the same fence and hedge line as the boundary between the properties. In fact, in her answer Defendant Miller admitted every substantive allegation contained in the complaint. She stated that "she had acquiesced in and agreed with every request made by plaintiffs in their First Cause of Action and only disputes the claim of the attorney fees." (R. at 19.) Thus, even the defendants eventually admitted that their assertion of interest in plaintiffs' property was without any basis in law or fact -- that it was without merit.

D. There are important policy reasons supporting plaintiffs' argument that the right to attorney's fees arising from the bad faith statute should not be superseded by the quiet title statute's prohibition of an award of costs.

There are two ways a trial court's docket can be clogged with frivolous litigation. In the first scenario, Party A takes a

completely unreasonable position, obstinately sticks by that position regardless of the facts or the law, and then files a frivolous lawsuit. The bad faith statute clearly provides a remedy to the defendant who has been unnecessarily dragged into court by Party A. In the second scenario, Party B takes and maintains a completely unreasonable position not supported by any laws or facts, thereby causing damage to Party A. In order to obtain relief from Party B's frivolous claims or assertions, Party A may eventually be left with no option but to resort to the courts.

If the trial court's interpretation of the bad faith statute in the present case is affirmed, the statute would not provide a remedy for Party A, the aggrieved Plaintiff, in the second scenario. The statute would become a one-edged sword, punishing "stubbornly litigious" plaintiffs and allowing "stubbornly litigious" defendants to act with impunity. Such an interpretation of the bad faith statute would result in reimbursement to a defendant for the costs of preparing an unnecessary answer but would withhold reimbursement from a plaintiff for the costs of preparing an unnecessary complaint. Under the trial court's interpretation, no matter how obstinate or malicious a defendant's pre-litigation conduct, the bad faith statute would provide no relief for the injured plaintiff who is forced to hire an attorney, prepare a complaint, and go to court to reclaim property that is indisputably his.

Equity should not and does not allow such disparate treatment of parties. In fact, Utah courts have recognized that an award of

attorney's fees can and should be used to curb the actions of obstinate defendants who require plaintiffs to resort to the courts unnecessarily. In Jensen v. Bowcut, 892 P.2d 1053 (Utah Ct. App. 1995), the court noted:

> [T]here are exceptions to the general rule that attorney's fees may only be awarded pursuant to contract or statute. In Stewart v. Public Service Comm'n, 885 P.2d 759, 782 (Utah 1994), the Utah Supreme Court stated that "in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney's fees when it deems appropriate in the interest of justice and equity." Courts have used the inherent power in various categories of cases. For example, courts have used their equitable power to award attorney's fees where a party has acted "'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" Id. at 782 (quoting James W. Moore, Moore's Federal Practice, Section 54.77 (2d Ed. 1972)).

In Jensen, the plaintiff was "required to finance legal fees to compel [the defendant] to fulfill his statutory obligations and duties" and "had little choice in bringing this matter before the Court . . . ." Jensen, 892 P.2d at 1058. Therefore, the court determined, "we believe that under these circumstances, equity demands the award of attorney's fees." Id. at 1059. Because the plaintiff in that case had a clearly defined right to the relief sought and the defendant obstinately refused to permit her enjoyment of that right, the court awarded plaintiff attorney's fees.

Other courts similarly award attorney's fees against defendants who force plaintiffs to file suit in order to enjoy clearly defined rights. In Harkeen v. Adams, 377 A.2d 617 (N.H. 1977), the New Hampshire Supreme Court determined that, "where an

individual is forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention," the individual should be awarded his attorney's fees. Id. at 619; see also Andrews v. District of Columbia, 443 A.2d 566, 569 (D.C. Cir. 1981), cert. denied, 459 U.S. 909 (1982); Bradley v. School Bd. of the City of Richmond, 345 F.2d 310, 321 (4th Cir. 1965), vacated on other grounds, 382 U.S. 103 (1965). These courts reason that a party forced to retain an attorney and pay the attorney's fees to establish an airtight claim ends up suffering substantial, unnecessary monetary damages. See Upson v. Board of Trustees, 474 A.2d 582 (N.H. 1984) (recognizing that in cases where there is a clearly established right which should have been enjoyed without judicial intervention, an award of attorney's fees is proper when a person is forced by another in bad faith to litigate to establish that right); see also Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Cal. L. Rev. 792 (1966).

Courts have also held that an award of attorney's fees is warranted where a plaintiff was forced to litigate to regain possession of property that had been converted by the defendant. See Gladstone v. Hillel, 250 Cal. Rptr. 372, 380-81 (Cal. Ct. App. 1988); Motor Ins. Co. v. Singleton, 677 S.W.2d 309, 315 (Ky. Ct. App. 1984); and Fulks v. Fulks, 121 N.E.2d 180 (Ohio 1953). See also 18 Am. Jur.2d Conversion § 120. When a party intentionally intrudes on the rights of another, and forces the other party to sue, the party who caused the litigation should pay the other's

attorney's fees. See Bradley v. School Bd. of Richmond, 345 F.2d 310, 321 (4th Cir. 1965) (holding that attorney's fees should be awarded "when it is found that the bringing of an action should have been unnecessary and was compelled by the [defendant's] unreasonable, obdurate obstinacy").

For decades, plaintiffs in the instant case had a clearly defined and established right to the use and enjoyment of the property north of the fence line. (R. at 4, 5.) Plaintiffs should not be precluded from recovering their attorney's fees simply because defendants' conduct required plaintiffs to initiate litigation to quiet title rather than waiting for defendants to sue them. It was inequitable for defendants to force plaintiffs to litigate for a right to which they were already entitled and should have enjoyed without interference. Requiring plaintiffs to also bear the costs of judicially securing that right from meritless and bad faith claims would only compound that inequity.

III. PLAINTIFFS SHOULD BE REIMBURSED FOR ATTORNEY'S FEES INCURRED PRIOR TO FILING SUIT, INCURRED AS A RESULT OF DEFENDANTS' BAD FAITH ASSERTION AND MAINTENANCE OF A MERITLESS CLAIM.

The issue of reimbursement for pre-litigation attorney's fees based on the bad faith statute has not been previously determined in Utah. However, there is significant precedent and authority in other jurisdictions supporting such an award. The U.S. Supreme Court has stated that "it is clear" that bad faith conduct sufficient to serve as the basis for an award of attorney's fees can as readily "be found . . . in the actions which led to the lawsuit" as in "the conduct of the litigation" itself. Hall v.

Cole, 412 U.S. 1, 13 (1973). See also Roadway Express Inc. v. Piper, 447 U.S. 752, 766 (1980); Schlank v. Williams, 572 A.2d 101, 111 (D.C. Ct. App. 1990) ("assum[ing] . . . that on a proper showing appellant would have been entitled to pre-litigation attorney's fees); 31 A.L.R. Fed. 833, Award of Counsel Fees to Prevailing Party Based on Adversary's Bad Faith, Obduracy, or Other Misconduct; and 49 A.L.R. 4th 825, Attorney's Fees; Obduracy, As Basis For State Court Award.

Furthermore, numerous other state courts have held that an award of attorney's fees is warranted by "bad faith" or "obduracy" during the pre-litigation time period. The courts' analyses in these cases focused on state statutes which are similar to Utah's bad faith statute in their failure to explicitly provide for or restrict a court's authority to grant an award of attorney's fees for pre-litigation bad faith conduct. See, e.g., Harkeen v. Adams, 377 A.2d 617 (N.H. 1977); Griffin v. New Hampshire Dept. of Employment Security, 370 A.2d 278 (N.H. 1977).

This Court should follow the well-established line of reasoning used by other jurisdictions and award pre-litigation attorney's fees to parties when the bad faith conduct of another forces them to unnecessarily fight for a clearly established right, eventually necessitating the filing of an unnecessary lawsuit. This Court should also award pre-litigation attorney's fees in order to discourage pre-litigation bad faith conduct. Because bad faith conduct both before and during litigation results in frivolous lawsuits clogging the legal system and innocent parties

being forced to spend money protecting rights that should never have been the subject of litigation, attorney's fees for pre-litigation bad faith actions should be recoverable by the prevailing party.

CONCLUSION

The trial court's decision constituted error in awarding attorney's fees to the defendants because defendants were not the prevailing party in the underlying dispute and are therefore not entitled to attorney's fees under Utah Code Ann. § 78-27-56, the bad faith statute.

The trial court also erred in denying plaintiffs' claim for attorney's fees by misinterpreting Utah Code Ann. § 78-40-3, the quiet title statute, and thereby determining that plaintiffs' request for attorney's fees was without merit. The trial court incorrectly ruled that this statute's prohibition against an award of "costs" also prohibits an award of "attorney's fees." The quiet title statute does not preclude an award of attorney's fees.

The trial court further committed error in denying an award of attorney's fees to plaintiffs pursuant to the bad faith statute. First, the trial court erred in failing to award attorney's fees to plaintiffs given that plaintiffs were the prevailing party in the underlying dispute. Second, because Defendant Miller's claim to plaintiffs' property was meritless due to plaintiffs' clear and undisputed right to the property, plaintiffs have a right to an award of attorney's fees under the bad faith statute. Third,

plaintiffs are entitled to attorney's fees because Defendant Miller's claim to the plaintiffs' property was made in bad faith. She asserted that claim with the intent to hinder and delay plaintiffs' enjoyment of an undisputed right and to attempt to force them to pay money to enjoy that right.

Finally, this Court should adopt the practice of other jurisdictions of allowing an award of pre-litigation attorney's fees incurred by one party as a result of another party's bad faith conduct. Given defendants' bad faith actions which necessitated the filing of plaintiffs' complaint, this Court should accordingly award plaintiffs reimbursement for all attorney's fees incurred in this matter.

For these reasons, plaintiffs respectfully request that this Court reverse the order of the trial court, thereby denying attorney's fees to the defendants and awarding attorney's fees to the plaintiffs.

RESPECTFULLY SUBMITTED this 4 day of June, 1996.

Gordon Duval

GORDON DUVAL
Attorney for Appellants

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Brief of Appellants was mailed to the following, postage prepaid, this 4 day of June, 1996.

Craig M. Snyder
Howard, Lewis & Petersen
120 East 300 North
P.O. Box 778
Provo, Utah 84603

Mary Jo Schaub
Secretary

ADDENDUM

public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks. 1979

78-27-52. Inherent risks of skiing — Definitions.

As used in this act:

(1) "Inherent risks of skiing" means those dangers or conditions which are an integral part of the sports of skiing, snowboarding, and ski jumping, including, but not limited to: changing weather conditions, variations or steepness in terrain; snow or ice conditions; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, impact with lift towers and other structures and their components; collisions with other skiers; and a skier's failure to ski or jump within the skier's own ability.

(2) "Injury" means any personal injury or property damage or loss.

(3) "Skier" means any person present in a ski area for the purpose of engaging in the sport of skiing, nordic, freestyle, or other types of ski jumping, and snowboarding.

(4) "Ski area" means any area designated by a ski area operator to be used for skiing, nordic, freestyle, or other type of ski jumping, and snowboarding.

(5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area. 1993

78-27-53. Inherent risks of skiing — Bar against claim or recovery from operator for injury from risks inherent in sport.

Notwithstanding anything in Sections 78-27-37 through 78-27-43 to the contrary, no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing. 1986

78-27-54. Inherent risks of skiing — Trail boards listing inherent risks and limitations on liability.

Ski area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this act. 1979

78-27-55. Repealed. 1980

78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1). 1988

78-27-56.5. Attorney's fees — Reciprocal rights to recover attorney's fees.

A court may award costs and attorney's fees to either party that prevails in a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees. 1986

78-27-57. Attorney's fees awarded to state funded agency in action against state or subdivision — Forfeit of appropriated monies.

Any agency or organization receiving state funds which, as a result of its suing the state, or political subdivision thereof, receives attorney's fees and costs as all or part of a settlement or award, shall forfeit to the General Fund, from its appropriated monies, an amount equal to the attorney's fees received. 1981

78-27-58. Service of judicial process by persons other than law enforcement officers.

Persons who are not peace officers, constables, sheriffs, or lawfully appointed deputies of such officers or authorized state investigators may not serve any forms of civil or criminal process other than complaints, summonses, and subpoenas. 1993

78-27-59. Immunity for transient shelters.

(1) As used in this section, "transient shelter" means any person which provides shelter, food, clothing, or other products or services without consideration to indigent persons.

(2) Except as provided in Subsection (3), all transient shelters, owners, operators, and employees of transient shelters, and persons who contribute products or services to transient shelters, are immune from suit for damages or injuries arising out of or related to the damaged or injured person's use of the products or services provided by the transient shelter.

(3) This section does not prohibit an action against a person for damages or injury intentionally caused by that person or resulting from his gross negligence. 1986

78-27-60. Limited immunity for architects and engineers inspecting earthquake damage.

(1) A professional engineer licensed under Title 58, Chapter 22, *Professional Engineers and Land Surveyors Licensing Act*, or an architect licensed under Title 58, Chapter 3, Architects Licensing Act, who provides structural inspection services at the scene of a declared national, state, or local emergency caused by a major earthquake is not liable for any personal injury, wrongful death, or property damage caused by the good faith inspection for structural integrity or nonstructural elements affecting health and safety of a structure used for human habitation or owned by a public entity if the inspection is performed:

(a) voluntarily, without compensation or the expectation of compensation;

(b) at the request of a public official or city or county building inspector acting in an official capacity; and

(c) within 30 days of the earthquake.

(2) The immunity provided for in Subsection (1) does not apply to gross negligence or willful misconduct. 1992

CHAPTER 27a

SMALL BUSINESS EQUAL ACCESS TO JUSTICE ACT

Section

78-27a-1. Short title.

This act shall be known and may be cited as the "Small Business Equal Access to Justice Act." 1983

78-27a-2. Legislative findings — Purpose.

The Legislature finds that small businesses may be deterred from seeking review of or defending against substantially

in common for the protection, confirmation or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action who have paid the expenses of such litigation or other proceedings all the expenses necessarily incurred therein, including attorneys' fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making such expenditures, and the same must be pleaded and allowed by the court and included in the final judgment, and shall be a lien upon the share of each tenant, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected. 1953

78-39-48. Abstract of title, cost of, inspection.

If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned and such abstract has been procured by the plaintiff, or if the plaintiff has failed to have the same made before the commencement of the action and any one of the defendants shall have such abstract afterwards made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties to the action, must be allowed and taxed. Whenever such abstract is procured by the plaintiff before the commencement of the action he must file with his complaint a notice that an abstract of the title has been made and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff has failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action with the clerk of the court, stating who is making the same and where it will be kept when finished. The court, or the judge thereof, may direct, from time to time during the progress of the action, who shall have custody of the abstract. 1953

78-39-49. Interest on advances to be allowed.

Whenever during the progress of the action for partition any disbursement shall have been made, under the direction of the court or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making the same. 1953

CHAPTER 40

QUIET TITLE

Section

78-40-1. Action to determine adverse claim to property — Authorized.

An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim. 1953

78-40-2. Lis pendens.

In any action affecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. 1953

78-40-3. Disclaimer or default by defendant — Costs.

If the defendant in such action disclaims in his answer any interest or estate in the property, or suffers judgment to be taken against him without answer, the plaintiff cannot recover costs. 1953

78-40-4. Termination of title pending action — Judgment — Damages.

If the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property. 1953

78-40-5. Setoff or counterclaim for improvements made.

When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value of such improvements, except improvements made upon mining property, must be allowed as a setoff or counterclaim against such damages. 1953

78-40-6. Right of entry pending action for purposes of action.

The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or to quiet title or to determine adverse claims thereto, or a judge of such court, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts or drifts thereon for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action. 1953

78-40-7. Order therefor — Liability for injuries.

The order must describe the property, and a copy thereof must be served on the owner or occupant, and thereupon such party may enter upon the property with necessary surveyors and assistants, and may make such survey and measurement; but if any unnecessary injury is done to the property, he is liable therefor. 1953

REGULAR SESSION

MINUTES

The American Fork City Planning Commission Meeting was held on June 15, 1994, at 7:00 p.m. in the American Fork City Hall. Those in attendance include Olani Durrant, John McKinney, Kent Walker, Michael Georgeson, Juel Belmont, Howard Denney, Rod Despain, James Hansen, *Richard Colborn, Jan Miller, Mr. and Mrs. Curtis Chipman, Reed Elm, Stephen Sowby, Wayne Patterson, Bill Arbus, Daniel Copper, Todd McCabe, Michael Menlove, and 13 citizens. Not in attendance were Patrick Fleming and J.H. Hadfield, who were excused. Terilyn Nelson took the first portion of the minutes.

ACTION ON THE HANSEN-SYKES ADDITION ANNEXATION AT 755 WEST 700 NORTH CONSISTING OF 3.107 ACRES TO BE ZONED R1-15,000

James Hansen, representing his father noted the point of the differences in the numbers of acres on the agenda and the annexation application. The reason for this was on the recommendation given a couple of months ago to get additional property for annexation. Howard Denney pointed out a problem of .17" difference between the Carson property and the Hansen-Sykes addition that would need to be worked out. **John McKinney moved to approve and recommend the Hansen/Sykes Annexation and zoning of R1-15,000 to the City Council. Michael Georgeson seconded the motion.** It was noted that it was the first annexation to the City of R1-15,000. **All were in favor.**

ACTION ON THE FINAL PLAT OF CURTIS CHIPMAN PLAT A SUBDIVISION AT 205 WEST 1120 NORTH

The problem brought to the Planning Commission was the dispute between the property lines of Jan Miller to the south and the Chipmans. There was a 5 foot discrepancy in which the Chipmans were claiming 5 feet that Ms. Miller said was hers. The Commission pointed out that the City does not get involved with land disputes and that they could not take any action until the problem was settled between the property owners. Mrs. Chipman said that a city official told her that the fence line was the property line, but she didn't know the name of the city official. It was pointed out that ten years ago, it was the fence line that was law, then it changed to yard by yard. It was suggested that both Ms. Miller and the Chipmans were paying taxes on the piece of property. Olani Durrant restated that the Planning Commission could not make a decision. The two parties were told that they would have to resolve the issue together. It was decided that Ms. Miller would not get occupancy and the Chipmans would not get a building permit until the problem was solved.

ACTION ON THE BALLANTYNE ANNEXATION CONSISTING OF .40 ACRES AT 420 NORTH 900 EAST TO BE ZONED R1-9000

Exhibit A
Record at 64

HARDING & ASSOCIATES, P.C.
Gordon Duval, Bar No. 6532
Attorney for Plaintiffs
110 South Main Street
Pleasant Grove, UT 84062
Telephone (801) 785-5350
Facsimile (801) 785-0853

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiff, vs. JANICE MILLER, DANA ANDERSON, and KIM ANDERSON. Defendants.	**AFFIDAVIT OF NOALL T. WOOTTON** Civil No. 950400145 Judge Guy R. Burningham

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

1. I am an attorney licensed to practice in Utah. I represented Curtis and Fay Chipman in a property boundary dispute with Jan Miller. I dictated and prepared the attached memo that described my conversation with Jan Miller on July 29, 1994. That memo correctly reflects my conversation with Jan at that time.

FURTHER THE AFFIANT SAYETH NOT.

DATED this 12th day of May, 1995.

NOALL T. WOOTTON

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Record at 81

SUBSCRIBED AND SWORN to before me this 12th day of May, 1995.

Kathleen B. Knight
NOTARY SIGNATURE
RESIDING AT UTAH COUNTY

MY COMMISSION EXPIRES: 7-15-96

To: The File

From: Noall T. Wootton

Date: July 29, 1994

Subject: Curtis Chipman

I met with Jan Miller this morning for a little over two hours. We went over the plats. At first, her attitude was that she wanted $8,000 from Curtis Chipman if he wants a Quit-Claim Deed to that property. She says, however, that she does not intend to disturb the present fenceline, but if he wants a record title to his property he is going to have to pay something for it. She said $8,000 is not a magical figure, but one she calculated because she had to pay $2,000 for about 200 feet of property along 150 West that Taylor demanded and figured this Chipman property was about 4 times that long. She did say that she would settle for $4,000, and she definitely does not want to go to court unless it is necessary.

On the Evans and Elms properties, she was at first adamant that she would not sell any property to them under any circumstances. Her reasoning was that the property in issue was accepted into the Miller Hilltop Subdivision plat by the City, and she does not want to have to go to the costs and inconvenience of amending that plat. I asked her if she would be willing to give them title to that property if they were willing to take care of getting her plat amended to take it out of there and if they would, in addition, put up a decorative fence of some kind. She said that if her son-in-law, Dana Anderson, and her daughter, Kim, were willing to do that, she will do it also.

Jan is going to talk to Dana and get back with me. I told her that as soon as she had done that, I would bring my clients in and would review everything and get back to her. Her position is that the lot 204 and lot 214 that Evans and Elms respectively own were never included in the plat of their property, so they never owned anything south of that down to the fence. I need to get a copy of that subdivision plat to see whether they bought the property by metes and bounds or whether they bought it by lot number. I also need to find out by them whether they knew that their platted lot number did not extend down to the fence. She tells me that she was privy to a conversation that they had with somebody (I think she mentioned the Mayor) wherein they acknowledged that they knew they didn't own that property.

I should wait to hear from her before proceeding further.

Exhibit C
Record at 62

HARDING & ASSOCIATES, P.C.
ATTORNEYS AT LAW
110 SOUTH MAIN STREET
PLEASANT GROVE, UTAH 84062

TELEPHONE (801) 785-5350
FACSIMILE (801) 785-0853

RAY M. HARDING, JR
JAMES "TUCKER" HANSEN
GORDON DUVAL
MARSHALL S. WITT
MARC H. BEAUCHEMIN

AMERICAN FORK OFFICE
306 WEST MAIN STREET
AMERICAN FORK, UTAH 84003
TELEPHONE (801) 756-7656
FACSIMILE (801) 756-7690

December 8, 1994

Janice Miller
P.O. Box 784
American Fork, UT 84003

Re: Ownership of Land Along the Chipman Fenceline

Dear Ms. Miller:

Curtis and Faye Chipman have asked that I represent them in their efforts to obtain clear title to the property within their fenceline and along their boundary. I understand there have been some communications with you regarding this and that you insist on being paid for the land within their fenceline. I have attached a case decided by the Utah Court of Appeals just a few weeks ago that clearly establishes that the Chipmans are entitled to the property within their fenceline and they do not need to buy it from you. This is because the fenceline has created a situation known as "boundary by acquiescence." That fence has been there as long as anybody can remember and has been treated as the boundary for decades. The Carter case that I have attached explains more fully why the Chipmans are entitled to the land within their fenceline without payment. There are many other Utah cases that stand for the same proposition.

If necessary the Chipmans will pursue their legal rights in the courts. I feel confident they will prevail if they are required to pursue that action. However, neither they nor I wish to take such drastic action unless it is absolutely necessary. They would much prefer to resolve this matter through conversation. To that end, please give me a call at 785-5350 so we can set up an appointment to get this matter resolved. If you have an attorney, I would encourage you to make him aware of this situation. If the Chipmans are forced to litigate this matter, it is very likely the court would require you to pay the Chipmans' attorney's fees.

Please respond by December 18, 1994, so we can get this matter resolved in as cordial a way as possible. I am looking forward to hearing from you.

Sincerely,

HARDING & ASSOCIATES, P.C.

Gordon Duval

GORDON DUVAL
Attorney at Law

GD:skh
cc: Curtis and Faye Chipman
Enclosure

misc-corr-5\mllr-cv.ltr

Record at 61

Exhibit D

7

HARDING & ASSOCIATES, P.C.
ATTORNEYS AT LAW
110 SOUTH MAIN STREET
PLEASANT GROVE, UTAH 84062

TELEPHONE (801) 785-5350
FACSIMILE (801) 785-0853

AY M HARDING, JR
MES "TUCKER" HANSEN
ORDON DUVAL
ARSHALL S WITT
ARC H BEAUCHEMIN

AMERICAN FORK OFFICE
306 WEST MAIN STREET
AMERICAN FORK, UTAH 84003
TELEPHONE (801) 756-7656
FACSIMILE (801) 756-7699

January 11, 1995

(HAND DELIVERED)
(2:20 p.m.)

Jan Miller
1095 North 150 West
American Fork, UT 84003

Re: Demand Letter

Dear Jan:

I am enclosing the original quit-claim deed resolving the boundary dispute between you and the Chipmans. I strongly urge you to sign the deed and deliver it to Mountain West Title Company, 871 South Orem Boulevard, Orem, Utah, no later than January 13, 1995. I have met with you and understand your position in this matter. I have extensively reviewed legal documents, deeds, and plats relating to the disputed land area and I have come to the conclusion that it is unreasonable for you to delay signing any longer. I believe any arguments you may raise in defense to this case would be frivolous. I understand you may not agree with my characterization of the case. However, I believe the following documents set forth in chronological order will explain how I arrived at that conclusion.

I have attached two maps that will assist you in locating the areas discussed in the various deeds I will reference. The first map shows the general area and the general relationship of the disputed property to other adjoining properties. The second map is more detailed containing the actual survey boundaries. Both maps are color coded to reflect the various deeds.

1. Exhibit A is the warranty deed whereby the Chipmans acquired the corner lot identified in yellow. This deed did not convey title all the way to the fence line that has existed for decades.

2. Exhibit B is a copy of the deed from you to NuTeam Inc. so they could proceed with the development of Kimberly Estates. This deed relates to the property identified in orange. This deed was executed in December 1991 and it is important because it shows as early as 1991, you were not paying for property taxes on the disputed area. The legal description of that deed shows the bearing of

Record at

8

"South 89°49'13" East along a fence line." That is a very important bearing because it is the bearing related to the fence line which is the subject of this dispute. You did not purport to convey any property north of that fence line and NuTeam purchased only up to the fence line.

3. Exhibit C is another document with your signature that relies on the fence line as a boundary. This is the document that apparently transfers your property from your trust to yourself as an individual. It is dated July 1993. The first part of the legal description refers to the area in pink, where your personal residence is located. You will note that the deed very clearly does not refer to property north of the fence line. Therefore your assertion that you had been paying property taxes on the disputed area is incorrect at least for recent years. The deed by which you hold the property clearly only goes to the fence line and no further. The second parcel of property identified in that deed is highlighted in blue. It also refers only to the fence line and does not purport to convey any interest north of the fence line.

4. Exhibit D is the plat map of Kimberly Estates and it shows that the old fence line was recognized by both Hillcrest Acres and Kimberly Estates as the property boundary between the two subdivisions. For 932.45 feet the dividing boundary between the two subdivisions is the fence running south 89°49' east. The only place where that is not the case is the last 61.28 feet in the northeastern property boundary where Kimberly Estates Subdivision specifically extends north of the fence line by 5.36 feet. All landowners on both sides of the fence for hundreds of feet accept the fence line and the bearing boundary that it creates as the appropriate property boundary line. The only exception is a little jog of 334 square feet where NuTeam, Inc., (Kimberly Estates) purchased additional property north of its lot 44.

5. Exhibit E is the quit-claim deed describing the 61 foot by 5 foot piece of land bought by Kimberly Estates north of the fence line. This area is identified in purple. Like NuTeam, Inc., if you claim property north of the fence line, you would have to buy it from the owners just like NuTeam, Inc., did.

6. The last exhibit, Exhibit F, is a subdivision plat for your own Miller Hilltop Subdivision. It too shows that your subdivision generally accepted the fence line as the boundary between Chipmans and your property. Once again the boundary identified on the plat map is the bearing "S 89°49'13" E" which correlates to the bearing of the fence line. Further, the easterly boundary of the subdivision shows a distance of 171.1 feet, which is the distance to the fence as is evidenced by the survey prepared by Cole Surveying and Engineering.

I believe these various documents clearly show that the Chipmans are entitled to the area identified in green. At least three of the documents, Exhibits B, C, and F, were prepared by you or your agents. Each of those documents bears your signature and reaffirms the fence line and its bearing (S 89°49'13" E) as the boundary between you and the Chipmans. For you to now be asserting an interest in property north of the fence line is unreasonable. Your claim that you have been paying property taxes on the disputed area is also invalid based upon these documents that show at least in recent years you have only been paying property taxes on the areas contained within the legal descriptions which reference the fence line.

I understand that you are concerned about the short strip of hedge that runs along the north side of your driveway. The hedge has existed there for about five decades and constitutes a "visible line" serving as a boundary just as real as the concrete fence of which it is an extension. That hedge has divided your property from the Chipmans' property for almost 50 years and it should not be disturbed unless there is some other replacement barrier to divide the properties. Based upon "boundary by acquiesence," the Chipmans have the same right to assert ownership over the area enclosed by the hedge as they do to assert ownership over the area enclosed by the fence line. The hedge is part of the fence line boundary. However, the Chipmans are willing to relinquish control over that small area so long as a substitute fence or other suitable boundary is constructed on the fence line. The Chipmans have assured me that they would be willing to split any costs incurred in constructing a suitable boundary enclosure that terminates on the existing corner post. In other words, the Chipmans are willing to relocate the hedge or other boundary marker to correlate to the survey property line so long as the current hedges are replaced by some other suitable boundary divider.

In conclusion, please deliver the executed deed to Mountain West Title Company on or before January 13, 1995. I will be calling the title company at 5:00 p.m. on the 13th and if the

completed deed is not in the possession of the title company t
I will immediately commence litigation.

Thank you for your attention to this matter. I hope we c
get this dispute resolved promptly.

Sincerely,

HARDING & ASSOCIATES, P.C.

Gordon Duval

GORDON DUVAL
Attorney at Law

GD:skh
Enclosure
cc: Curt and Fay Chipman

misc-corr-5\chpmn-cv.ltr

Salt Lake City, Utah 84115

QUIT-CLAIM DEED

Janice Miller, Trustee of the Janice R. Miller Family Trust

grantor
of QUIT-CLAIM to , County of Utah , State of Utah, hereby

Outcome Inc.

grantee
of American Fork City, Utah County, Utah for the sum of
TEN & NO/100 and other good and valuable considerations DOLLARS,
the following described tract of land in Utah County,
State of Utah:

SEE ATTACHED LEGAL

Witness the hand of said grantor, this Twenty Sixth day of
December, A. D. one thousand nine hundred and Ninety-One

Signed in the presence of

Janice Miller, Trustee

Janice Miller, Trustee

STATE OF UTAH,
County of Salt Lake } ss.

On the First day of December January A. D. one
thousand nine hundred and Ninety-One personally appeared before me
Janice Miller, Trustee of the Janice R. Miller Family Trust
the signer of the foregoing instrument, who duly acknowledge to me that he executed the
same.

Kaye R. Carson
NOTARY PUBLIC
Residing at: Salt Lake City, Utah

My commission expires: 10/30/93 6-1-93

Address: 33 West 600 South Salt Lake City, Utah
American Fork, UT 84003

THE [illegible] OF [illegible] UTAH COUNTY RECORDER'S OFFICE

Record at 48

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WHEN RECORDED, MAIL TO:

JANICE R. MILLER

1097 N. 150 W.

AMERICAN FORK, UT 84003

ENT 45952 BK 3193 PG 124
NINA B. REID UTAH CO RECORDER BY NB
1993 JUL 9 11:24 AM FEE 13.00
RECORDED FOR MOUNTAIN WEST TITLE CO

Space Above This Line For Recorder's Use

M-9614

QUIT-CLAIM DEED

JANICE R. MILLER, TRUSTEE

grantor

of American Fork County of Utah, State of Utah, hereby QUIT-CLAIM to

JANICE R. MILLER, TRUSTEE

grantee

of for the sum of

TEN DOLLARS AND OTHER GOOD AND VALUABLE CONSIDERATION ———— DOLLARS,

the following described tract of land in UTAH County, State of Utah:

SEE EXHIBIT "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

To Fence line

Witness the hand of said grantor, this 7TH day of JULY, A. D. 19 93

Janice R. Miller, Trustee

JANICE R. MILLER, TRUSTEE

STATE OF UTAH,
County of Utah ss.

On the 7th day of July A.D.one thousand nine hundred and ninety-three personally appeared before me

JANICE R. MILLER, TRUSTEE

the signer of the within instrument, who duly acknowledge to me that he executed the same.

SHARON FRANCIS

Notary Public

Residing in

My commission expires

Record at 4C
Mountain West Title Company

13

by_____ Dep. Book_____ Page_____ Ref.:_____

Mail tax notice to NuTeam Inc. Address 2185 S Main SLC 84115

QUIT-CLAIM DEED

Melvin V. Frandsen

of Lehi County of Utah State of Utah, hereby grantor

QUIT-CLAIM to

NuTeam Inc.

of Salt Lake, Salt Lake, Utah grantee

TEN & NO/100 and other good and valuable considerations for the sum of DOLLARS,

the following described tract of land in Utah County, State of Utah:

Beginning at a boundary corner on the South boundary line of Hill Crest Acres Subdivision, Plat "H", said boundary corner is located South 89°49'57" East 49.28 feet from the Southwest Corner of lot 203 of said subdivision; thence North 5.36 feet along said boundary line; thence East 61.28 feet along said boundary line; thence South 0°56'00" West 5.54 feet; thence North 89°49'57" West 61.19 feet to the point of beginning, containing 334 square feet.

WITNESS the hand of said grantor, this Twenty-sixth day of October A. D. one thousand nine hundred and [redacted]

Signed in the presence of

Melvin V. Frandsen

DARON HART ROWLEY
NOTARY PUBLIC - STATE of UTAH
160 EAST 100 SOUTH
AMERICAN FORK, UT 84003
COMM. EXP. 10-7-97

STATE OF UTAH, }
County of } ss.

On the 7 day of Dec A. D. one thousand nine hundred and Ninety-three personally appeared before me Melvin V. Frandsen

the signer of the foregoing instrument, who duly acknowledge to me that he executed the same.

Notary Public

My commission expires 10-7-97 Address: 160 E 100 S AF Ut.

BLANK NO. 100 — © OLSEN PTG. CO. — 1200 SO. 3600 EAST — SALT LAKE CITY — UT Rev

Tue Jun 28 1994 10:11 UTAH COUNTY RECORDERS OFFICE

Record at 42

10. The fence and hedge have existed for more than 20 years and have continually been accepted and treated by plaintiffs, and their predecessors in title, and by the defendants' predecessors in title, as the boundary line between their respective properties during that time.

11. At the time the defendants acquired title to the lands lying south of the fence and hedge line, the fence and hedge was already in existence upon the plaintiffs' land and separated the plaintiffs' land from the land acquired by the defendants. The defendants acquired the land with full knowledge of the location of the fence and hedge and understood that plaintiffs and their predecessors claimed title to all land to the north of the fence and hedge.

12. The defendants' predecessors in title, with full knowledge of the location of the fence and hedge, acquiesced, agreed to, and recognized the location of the fence and hedge as the agreed upon dividing line between the plaintiffs' and defendants' property.

13. In the past, Defendant Miller acknowledged the boundary created by the fence line. In December of 1991 Defendant Miller executed a deed of real property to NuTeam, Inc. The legal description in the defendant's deed employed the fence line which is in dispute in this action as the northern

Record at 4

HARDING & ASSOCIATES, P.C.
Gordon Duval, Bar No. 6532
Attorney for Plaintiffs
110 South Main Street
Pleasant Grove, UT 84062
Telephone (801) 785-5350
Facsimile (801) 785-0853

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiff, vs. JANICE MILLER, DANA ANDERSON, and KIM ANDERSON. Defendants.	**AFFIDAVIT OF CURTIS CHIPMAN** Civil No. 950400145 Judge Guy R. Burningham

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, CURTIS CHIPMAN, being first duly sworn upon my oath, declare and state as follows:

1. I am a plaintiff in this matter.

2. In discussions with Jan Miller in the spring of 1994 she told me that she owned property five feet over the fenceline. She told me that we had to buy that land from her. If we didn't pay her she said "I'll see that you will never sell a bit of that ground." I believe that this is almost a direct quote.

3. In the spring of 1994 I gave Jan's son-in-law a copy of the attached newspaper article trying to convince her that she

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Record at 85

had no right to claim our property north of the fenceline. I asked the son-in-law to give the article to Jan Miller.

4. At the Planning Commission meeting of June 15, 1994, Jan Miller appeared and objected to our request for a building permit so she could prevent our son from getting a building permit. Her actions caused us to lose hundreds of dollars and three months of building time.

FURTHER THE AFFIANT SAYETH NOT.

DATED this 15th day of May, 1995.

CURTIS CHIPMAN
Plaintiff

SUBSCRIBED AND SWORN to before me this 15th day of May, 1995.

NOTARY PUBLIC
SUSAN K. HARRIS
110 So. 1st St.
Pleasant Grove, Utah 84062
My Commission Expires: 10-4-95
State of Utah

NOTARY SIGNATURE
RESIDING AT UTAH COUNTY

MY COMMISSION EXPIRES: _____

HARDING & ASSOCIATES, P.C.
Gordon Duval, Bar No. 6532
Attorney for Plaintiffs
110 South Main Street
Pleasant Grove, UT 84062
Telephone (801) 785-5350
Facsimile (801) 785-0853

IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiff, vs. JANICE MILLER, DANA ANDERSON, and KIM ANDERSON. Defendants.	**AFFIDAVIT OF FAY CHIPMAN** Civil No. 950400145 Judge Guy R. Burningham

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, FAY CHIPMAN, being first duly sworn upon my oath, declare and state as follows:

1. I am a plaintiff in this matter.

2. In discussions with Jan Miller in the spring of 1994 she told me that she owned property five feet over the fenceline. She told me that we had to buy that land from her for $12,000.00. If we didn't pay her she said "I'll see that you will never sell a bit of that ground." I believe that this is almost a direct quote.

18

Record at 83

3. At the Planning Commission meeting of June 15, 1994, Jan Miller appeared and objected to our request for a building permit so she could prevent our son from getting a building permit.

FURTHER THE AFFIANT SAYETH NOT.

DATED this 15th day of May, 1995.

Fay Chipman

FAY CHIPMAN
Plaintiff

SUBSCRIBED AND SWORN to before me this 15th day of May, 1995.

NOTARY PUBLIC
SUSAN K. HARRIS
110 So. Main St.
Pleasant Grove, Utah 84062
My Commission Expires: 10-4-95
State of Utah

Susan K. Harris

NOTARY SIGNATURE
RESIDING AT UTAH COUNTY

MY COMMISSION EXPIRES: _____

HARDING & ASSOCIATES, P.C.
ATTORNEYS AT LAW
110 SOUTH MAIN STREET
PLEASANT GROVE, UTAH 84062
TELEPHONE (801) 785-5350
FACSIMILE (801) 785-0853

RAY M. HARDING, JR.
JAMES "TUCKER" HANSEN
GORDON DUVAL
MARSHALL S. WITT
C. VAL MORLEY

AMERICAN FORK OFFICE
306 WEST MAIN STREET
AMERICAN FORK, UTAH 84003
TELEPHONE (801) 756-7658
FACSIMILE (801) 756-7699

FACSIMILE TRANSMITTAL

Cover Sheet for FAX Transmissions
From HARDING & ASSOCIATES, PC
FAX No. (801) 785-0853

TO: Craig Snyder

RE: Chipman v. Miller

FROM: Gordon Duval GD

No. of pages sent 2 (Including cover sheet)

COMMENTS: I have attached the document we discussed earlier. If you will confirm in writing that Dana and Kim Anderson do not claim an interest in property north of the fence line between Andersons and Chipmans, then I will gladly prepare an order dismissing Dana and Kim from the lawsuit. As to Jan Miller, please answer on her behalf by close of business on Wednesday, April 5, 1995. Thank you.

gd.forms\form.ltr

Record at 39

20

TRANSMISSION REPORT APR 03 '95 14:13

RECEIVER: [illegible]4991

PAGES SENT: 02

DURATION: 01:12

110 SOUTH MAIN STREET
PLEASANT GROVE, UTAH 84062

TELEPHONE (801) 785-5350
FACSIMILE (801) 785-0853

RAY M. HARDING, JR.
JAMES "TUCKER" HANSEN
GORDON DUVAL
MARSHALL S. WITT
MARC H. BEAUCHEMIN

AMERICAN FORK OFFICE
306 WEST MAIN STREET
AMERICAN FORK, UTAH 84003
TELEPHONE (801) 756-7688
FACSIMILE (801) 756-7689

TO: Craig Snyder

FROM: Gordon Duval

DATE: 4/7/95

RE: Chipman v Miller

Enclosed please find: another quit-claim deed for your client. I have not received your letter yet, but we still need to talk about attorney fees.

__X__ For your information

_____ In accordance with your request, I have signed and forwarded it to the court for signature.

_____ Please sign before a notary public and return

_____ Please telephone me

_____ Please handle

_____ Please sign and return

_____ Please approve as to form and return

_____ Please review and call me immediately to discuss

Comments:

gd_forms\form.ltr

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Exhibit I

HARDING & ASSOCIATES, P.C.
ATTORNEYS AT LAW
110 SOUTH MAIN STREET
PLEASANT GROVE, UTAH 84062

TELEPHONE (801) 785-5350
FACSIMILE (801) 785-0853

RAY M. HARDING, JR.
JAMES "TUCKER" HANSEN
GORDON DUVAL
MARSHALL S. WITT
C. VAL MORLEY

AMERICAN FORK OFFICE
306 WEST MAIN STREET
AMERICAN FORK, UTAH 84003
TELEPHONE (801) 756-7656
FACSIMILE (801) 756-7699

FACSIMILE TRANSMITTAL

Cover Sheet for FAX Transmissions
From HARDING & ASSOCIATES, PC
FAX No. (801) 785-0853

TO: Craig Snyder

RE: Chipman v. Miller

FROM: Gordon Duval GD

No. of pages sent 1 (Including cover sheet)

COMMENTS: I have not yet received the letter you mentioned or the signed quit-claim deed. I will need to file a default judgment against Jan Miller on 4-18-95. I will not file the default judgment against the Andersons based on your representation that you will confirm in writing that the Andersons do not assert an interest in Chipman's property.

misc-corr-6\chipman-cv.ltr

Record at 36

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TRANSMISSION REPORT

APR 16 '95 07:22

April 14, 1995 is correct date
Susan Hansen

RECEIVER: 3774991

PAGES SENT: 01

DURATION: 00:38

Fax #
377-4991

24

Record at 35

ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
Post Office Box 778
Provo, Utah 84603

Telephone: (801) 373-6345
Facsimile: (801) 377-4991

File No. 23.152

Jackson Howard
Don R. Petersen
Craig M. Snyder
John L. Valentine
D. David Lambert
Fred D. Howard
Leslie W. Slaugh

Richard W. Daynes
Phillip E. Lowry
Kenneth Parkinson

OF COUNSEL
S. Rex Lewis

April 14, 1995

VIA FAX # 785-0853

Gordon Duval, Esq.
Harding & Associates
110 South Main
Pleasant Grove, UT 84062

Re: Chipman v. Miller and Anderson

Dear Gordon:

Enclosed please find a copy of the Warranty Deed from Janice R. Miller to Dr. Dana A. Anderson and his wife, Kim. Please be advised that Dr. and Mrs. Anderson do not claim any interest in any property north of the existing fence line between the Anderson property and the Chipman property. As I have indicated to you, Dr. Anderson believes that he and his wife should not have been included as parties to the Chipmans' litigation.

I have also reviewed the allegations contained in your complaint with Mrs. Miller. I have explained to her my understanding of the law with regard to boundary line by acquiescence and I have also provided her with a copy of the information that you furnished to me from Pleasant Grove City concerning the hedge. Part of the problem is obviously that the ground slopes significantly so that Mrs. Miller's driveway is actually significantly below 42 inches from the top of the hedge. Nonetheless, Mrs. Miller is willing to sign a quit claim deed to the Andersons if you will provide one that is consistent with a survey of the fence line.

I will endeavor to have her sign that quit claim deed to comply with your deadline, however, she will not agree to pay attorney fees to your clients and quite frankly I believe you have no statutory basis for an award of attorney fees herein, particularly if she concedes the allegations contained in your complaint. Furthermore, from our standpoint Dr. Anderson has a claim for attorney fees in connection with these proceedings that is probably superior from a legal point of view to any claim that your clients may make against Mrs. Miller.

If this matter can be resolved on the basis suggested in this letter, please advise me immediately. If it cannot, then it will be Mrs. Miller's intent to contest any request that you may make for attorney fees and it will be Dr. Anderson's intent to assert attorney fees against your client and sanctions in accordance with Rule 11.

Record at 31

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Exhibit K

HARDING & ASSOCIATES, P.C.
ATTORNEYS AT LAW
110 SOUTH MAIN STREET
PLEASANT GROVE, UTAH 84062

TELEPHONE (801) 785-5350
FACSIMILE (801) 785-0853

RAY M. HARDING, JR.
JAMES "TUCKER" HANSEN
GORDON DUVAL
MARSHALL S. WITT
C. VAL MORLEY

AMERICAN FORK OFFICE
306 WEST MAIN STREET
AMERICAN FORK, UTAH 84003
TELEPHONE (801) 756-7656
FACSIMILE (801) 756-7699

April 18, 1995
Fax and Mail Delivery

Craig Snyder
120 East 300 North
Provo, UT 84606

Re: Chipman v. Miller

Dear Craig:

This letter serves as a follow-up to our telephone conversation earlier today when I indicated an answer would be due. I wanted to clarify that no answer is due from the Andersons. An answer is only due from Ms. Miller, as previously stated in my April 3, 1995, fax to you, I will prepare an order dismissing Dana and Kim from the lawsuit based upon the letter I received from you Friday indicating the Andersons are not claiming any interest in property north of the existing fenceline between the Andersons and the Chipmans.

You indicated you had a quit-claim deed signed by Ms. Miller and could send me a copy of it. You also indicated you intended to take additional actions escalating this lawsuit. To avoid an escalation of this situation, I am granting to you an extension of time to file an answer until close of business on April 21, 1995. That will allow me a chance to visit with my clients to see how they want to proceed now that Ms. Miller has apparently signed a quit-claim deed and you are in the process of delivering that deed to me. To assist in the possible settlement of this situation, please fax me a copy of the deed your client has signed, as well as mailing the original to me as we previously discussed.

Thank you for your assistance and if you have any questions, please feel free to give me a call.

Sincerely,

HARDING & ASSOCIATES, P.C.

Gordon Duval

GORDON DUVAL
Attorney at Law

GD:skh
cc: Fay and Curtis Chipman

Record at 29

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misc-corr-6\chipman-cv.ltr

CRAIG M. SNYDER (3033), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No.

Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiffs, vs. JANICE MILLER, DANA ANDERSON and KIM ANDERSON, Defendants.	**ANSWER OF DEFENDANTS DANA ANDERSON AND KIM ANDERSON, COUNTERCLAIM AND REQUEST FOR RULE 11 SANCTIONS** Case No. 950400145 Judge Guy R. Burningham

ANSWER

COMES NOW the defendants Dana Anderson and Kim Anderson and answer the Complaint of the plaintiffs on file herein and admit, deny and allege as follows:

FIRST DEFENSE

There has been a complete accord and satisfaction in connection with this matter, since the defendant Janice Miller has tendered a quit claim deed signed by her on the 14th day of April, 1995, to the plaintiffs through their counsel. Said quit claim deed was prepared by plaintiffs' counsel.

Record at 16

SECOND DEFENSE

These defendants have never claimed any interest in any property lying north of the fence line that exists between these defendants' property and the property owned by the plaintiffs. These defendants have never had any conversation with the plaintiffs concerning any property dispute. These defendants have informed the plaintiffs through counsel on April 7, 1995, and in writing on April 14, 1995, that they claimed no interest in the property lying north of the fence line between these defendants and the plaintiffs' property.

THIRD DEFENSE

1. These defendants admit the allegations contained in paragraphs 1, 2, 3 and 4 of the plaintiffs' Complaint.

2. These defendants deny the allegations contained in paragraph 5 of the plaintiffs' Complaint.

3. Answering paragraph 6 of the plaintiffs' Complaint, these defendants reallege and incorporate by reference their answers to the allegations contained in paragraphs 1 through 5 of the plaintiffs' Complaint.

4. These defendants admit the allegations contained in paragraph 7 of the plaintiffs' Complaint.

5. Answering paragraph 8 of the plaintiffs' Complaint, these defendants deny that there is a hedge between their property and the property of the plaintiffs, although these

defendants believe that there does exist a hedge between the plaintiffs' property and that of the co-defendant Miller's property.

6. Answering paragraphs 9, 10, 11 and 12 of plaintiffs' Complaint, these defendants admit the allegations contained therein with the exception of the reference to the hedge between these defendants and the plaintiffs' property.

7. These defendants are without sufficient knowledge and information to form a belief as to the truth of the allegations contained in paragraphs 13, 14, 15 and 16 of plaintiffs' Complaint. Said allegations appear to apply to the co-defendant Miller, and these defendants are without knowledge as to the truth of said allegations and, therefore, these defendants have no basis to either admit or deny said allegations. These defendants, however, do not assert any right, title or interest in the property lying north of the fence line that exists between these defendants' property and the plaintiffs' property.

8. These defendants admit the allegations contained in paragraphs 17 and 18 of plaintiffs' Complaint.

9. These defendants deny the allegations contained in paragraph 19 of the plaintiffs' Complaint.

10. These defendants admit the allegations contained in paragraph 20 of the plaintiffs' Complaint.

11. Answering paragraph 21 of the plaintiffs' Complaint, these defendants reallege and incorporate herein by reference each and every response made by these defendants to paragraphs 1 through 20 of the plaintiffs' Complaint.

12. Answering paragraph 22 of the plaintiffs' Complaint, these defendants assert that they have never claimed any interest in property owned by the plaintiffs north of the existing fence line between the plaintiffs' property and these defendants' property. Furthermore, these defendants have informed the plaintiffs through their counsel orally on April 7, 1995, and by letter dated April 14, 1995, that they assert no claim to any property lying north of the existing fence line. These defendants deny that the plaintiffs are entitled to attorney fees based upon § 78-27-56, and they deny each and every other allegation contained in paragraph 22 of the plaintiffs' Complaint.

13. These defendants deny the allegations contained in paragraph 23 of the plaintiffs' Complaint.

WHEREFORE, these defendants pray that plaintiffs take nothing by way of the Second Cause of Action of their Complaint, that the plaintiffs be awarded the relief sought by their First Cause of Action, since these defendants have never claimed any interest in any property located north of the existing fence line, and that these defendants be awarded their costs and attorney fees incurred in this action in accordance with the allegations contained in the attached Counterclaim, together with such other and further relief as to the Court may seem just and proper in these premises.

COUNTERCLAIM

COME NOW the defendants Dana Anderson and Kim Anderson and counterclaim against the plaintiffs and for a cause of action allege:

1. The action brought by plaintiffs against these defendants is without merit and is neither brought nor asserted in good faith.

2. These defendants have never claimed any right, title or interest in property owned by the plaintiffs located north of the existing fence line between the plaintiffs' property and these defendants' property.

3. These defendants should never have been named as parties to this action.

4. The existing deed to these defendants in their record chain of title does not claim any property located north of the existing fence line.

5. These defendants are entitled to their attorney fees pursuant to the provisions of § 78-27-56, Utah Code Annotated, 1953, as amended.

6. Plaintiffs' complaint against these defendants is not well grounded in fact nor is it warranted by existing law, and further, it is not interposed for any proper purpose. Plaintiffs' Complaint and their request for attorney fees is made only for purposes of harassment and to needlessly increase the cost of this litigation. These defendants are entitled to sanctions, including attorney fees and costs in accordance with the provisions of Rule 11 of the Utah Rules of Civil Procedure.

WHEREFORE, these defendants pray that the Court award their attorney fees and court costs in accordance with the provisions of § 78-27-56 and/or Rule 11 of the Utah Rules of Civil Procedure, together with such other and further relief as to the Court may seem just and proper in these premises.

DATED this 18th day of April, 1995.

Craig M. Snyder

CRAIG M. SNYDER, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendants

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 18th day of April, 1995.

Gordon Duval
Harding & Associates
110 South Main Street
Pleasant Grove, UT 84062

Donna Judson

SECRETARY

J:\CMS\ANDERSON.ANS

CRAIG M. SNYDER (3033), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Attorneys for Defendants

Our File No.

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiffs, vs. JANICE MILLER, DANA ANDERSON and KIM ANDERSON, Defendants.	**ANSWER OF DEFENDANT JANICE MILLER, COUNTERCLAIM AND REQUEST FOR RULE 11 SANCTIONS** Case No. 950400145 Judge Guy R. Burningham

ANSWER

COMES NOW the defendant Janice Miller and answers the Complaint of the plaintiffs on file herein and admits, denies and alleges as follows:

FIRST DEFENSE

There has been an accord and satisfaction in connection with this matter, since the defendant Janice Miller has tendered a quit claim deed signed by her on the 14th day of April,

1995, to the plaintiffs through their counsel. Said quit claim deed was prepared by plaintiffs' counsel.

SECOND DEFENSE

Plaintiffs' counsel has required defendant Janice Miller to file this Answer on the basis that plaintiffs' counsel still believes that there exists a right to attorney fees on behalf of plaintiffs under § 78-27-56, Utah Code Annotated, 1953, as amended. See affidavit of Craig M. Snyder attached hereto and incorporated herein by reference.

THIRD DEFENSE

1. This defendant admits the allegations contained in paragraphs 1, 2, 3 and 4 of the plaintiffs' Complaint.

2. This defendant denies the allegations contained in paragraph 5 of the plaintiffs' Complaint.

3. Answering paragraph 6 of the plaintiffs' Complaint, this defendant realleges and incorporates by reference her answer to the allegations contained in paragraphs 1 through 5 of the plaintiffs' Complaint.

4. This defendant admits the allegations contained in paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 20 of the plaintiffs' Compliant.

5. This defendant denies the allegations contained in paragraph 19 of the plaintiffs' Complaint.

6. Answering paragraph 21 of the plaintiffs' Complaint, this defendant realleges and incorporates herein by reference each and every response made by this defendant to paragraphs 1 through 20 of the plaintiffs' Complaint.

7. Answering paragraph 22 of the plaintiffs' Complaint, this defendant alleges that she asserts no defense to this action, and that her only response to this action has been in good faith to seek the advice of counsel and to provide the plaintiffs with a quit claim deed concerning the property in question, even though that property is not described by the plaintiffs in their Complaint. This defendant further alleges that she has acquiesced in and agreed with every request made by the plaintiffs in their First Cause of Action and only disputes the claim of the plaintiffs to attorney fees under § 78-27-56. This defendant denies that plaintiffs are entitled to attorney fees in this matter.

8. This defendant denies the allegations contained in paragraph 23 of the plaintiffs' Complaint.

WHEREFORE, this defendant prays that plaintiffs take nothing by way of the Second Cause of Action of their Complaint, that the plaintiffs be awarded the relief sought by their First Cause of Action, and that this defendant be awarded her costs and attorney fees incurred in this action in accordance with the allegations contained in the attached Counterclaim, together with such other and further relief as to the Court may seem just and proper in these premises.

COUNTERCLAIM

COMES NOW the defendant Janice Miller and counterclaims against the plaintiffs and for cause of action alleges:

1. This defendant has been required by counsel for the plaintiffs to file an answer to the Second Cause of Action of plaintiffs' Complaint. (See Affidavit of Craig M. Snyder attached hereto and incorporated herein by reference.)

2. Said request on behalf of plaintiffs' counsel is without merit and is not brought or asserted in good faith.

3. The request of plaintiffs made through their counsel is frivolous and made contrary to the provisions of § 78-27-56.

4. Counsel for this defendant has previously informed counsel for plaintiffs that this defendant has acquiesced in and consented to all of the relief claimed in plaintiffs' First Cause of Action, and that this defendant had signed a quit claim deed prepared by counsel for the plaintiffs and that counsel for this defendant has delivered that quit claim deed to counsel for the plaintiffs on April 18, 1995, or by mail as requested by counsel for the plaintiffs.

5. Said request for attorney fees violates the provisions of Rule 11 of the Utah Rules of Civil Procedure and is designed to harass, cause unnecessary delay or to needlessly increase the cost of litigation.

6. This defendant is entitled to her attorney fees and court costs incurred herein in being forced to respond to the request for attorney fees and in accordance with the provisions

of Rule 11 of the Utah Rules of Civil Procedure and § 78-27-56 of the Utah Code Annotated.

WHEREFORE, this defendant prays that the Court award her attorney fees and court costs in accordance with the provisions of § 78-27-56 and/or Rule 11 of the Utah Rules of Civil Procedure, together with such other and further relief as to the Court may seem just and proper in these premises.

DATED this 18th day of April, 1995.

Craig M. Snyder

CRAIG M. SNYDER, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendants

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 18th day of April, 1995.

Gordon Duval
Harding & Associates
110 South Main Street
Pleasant Grove, UT 84062

SECRETARY

have never had any claim or deed to the disputed property and never should have been a party to this action. Furthermore, counsel for the Andersons notified the plaintiffs by telephone and later in writing that the Andersons claimed no interest in the disputed property. Memorandum in Support of Plaintiffs' Cross Motion for Attorney's Fees, Exhibit K (fax from Mr. Snyder to Mr. DuVal, dated April 14, 1995). For all the above reasons, the defendants should be awarded their attorney fees and costs and sanctions in accordance with Rule 11 of the Utah Rules of Civil Procedure.

DATED this 9th day of May, 1995.

Craig M. Snyder

CRAIG M. SNYDER, for:
HOWARD, LEWIS & PETERSEN
Attorneys for Defendants

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GORDON DUVAL -- No. 6532
HARDING & ASSOCIATES, P.C.
Attorney for Plaintiffs
110 South Main Street
Pleasant Grove, Utah 84062
Telephone: (801) 785-5350

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiffs, vs. JANICE MILLER, DANA ANDERSON, and KIM ANDERSON. Defendants.	**STIPULATED ORDER FOR DISMISSAL OF TWO DEFENDANTS** Civil No. 950400145 Judge _____

The parties hereby agree that Dana Anderson and Kim Anderson should be dismissed from this litigation. This dismissal shall be with prejudice.

DATED this 20 day of April, 1995.

HARDING & ASSOCIATES, P.C.

Gordon Duval
GORDON DUVAL

DATED this _____ day of April, 1995.

_____
CRAIG SNYDER

EXHIBIT C 39

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ORDER

Based upon the above stipulation of the parties, IT IS HEREBY ORDERED that Dana and Kim Anderson be dismissed from this litigation. This dismissal is with prejudice.

DATED this _____ day of April, 1995.

DISTRICT COURT JUDGE

GUY R. BURNINGHAM

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MAILING CERTIFICATE

I certify that a true and correct copy of the STIPULATED ORDER FOR DISMISSAL was mailed the 20th day of April, 1995, postage prepaid, to:

CRAIG M. SNYDER
120 East 300 North
Provo, UT 84606

Susan Kay Hands
SECRETARY

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiffs, vs. JANICE MILLER, DANA ANDERSON and KIM ANDERSON, Defendants.	CASE NO. 950400145 RULING

This matter comes before the Court, under Rule 4-501 on Cross Motions for Attorney's fees. The Court has reviewed the file, considered the memoranda of counsel, and upon being advised in the premises, now makes the following:

RULING

1. Pursuant to UCA § 78-27-56, Plaintiff's request for attorney's fees is DENIED and Defendant's request for attorney's fees is GRANTED in the amount of $484.00.

Counsel for the Defendant is to prepare an order consistent with the terms of this

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JUL 26 19[illegible]

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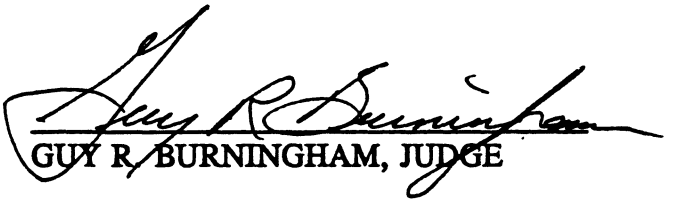
ruling and submit it to opposing counsel for approval as to form prior to submission to the Court for signature.

Dated this 20 day of July, 1995.

BY THE COURT:



GUY R. BURNINGHAM, JUDGE

cc: Gordon Duval, Esq.
Craig M. Snyder, Esq.

CRAIG M. SNYDER (3033), for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345
Facsimile: (801) 377-4991

Our File No. 23,152

Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiffs, vs. JANICE MILLER, DANA ANDERSON and KIM ANDERSON, Defendants.	**ORDER AND JUDGMENT** Case No. 950400145

This matter came on regularly before the court pursuant to the provisions of Rule 4-501, the Code of Judicial Administration on Cross Motions each seeking an award of attorney's fees. The court has reviewed the motions made by both parties as considered the memoranda and affidavits submitted by counsel and after reviewing the pleadings on file herein and being fully advised in the premises does now make and enter the following order and judgment. It is hereby ordered adjudged and decreed:

1. Pursuant to Utah Code Annotated § 78-27-56, plaintiffs' request for attorney's fees is denied.

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2. Pursuant to Utah Code Annotated § 78-27-56, defendants' request for attorney's fees is granted and defendants are awarded judgment against the plaintiffs in the amount of $484.00.

3. Said judgment shall accrue interest at the legal rate of 9.22% from date hereof until paid in full.

DATED this _____ day of August, 1995.

BY THE COURT:

_____
GUY R. BURNINGHAM
District Judge

APPROVED AS TO FORM:

GORDON DUVAL, for:
HARDING & ASSOCIATES
Attorney for Plaintiffs

J:\CMS\MILLER.ORD

GORDON DUVAL -- No. 6532
DUVAL HANSEN WITT & MORLEY, L.L.C.
Attorney for Plaintiffs
110 South Main Street
Pleasant Grove, Utah 84062
Telephone: (801) 785-5350

**IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH**

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiffs, vs. JANICE MILLER, DANA ANDERSON, and KIM ANDERSON. Defendants.	**PLAINTIFFS' NOTICE OF OBJECTIONS TO THE PROPOSED ORDER AND JUDGMENT** Civil No. 950400145 Judge Guy Burningham

This court has issued a ruling denying the plaintiffs' motion for attorney's fees and granting the defendants' motion for attorney's fees. The defendants have proposed an order and judgment incorporating this court's ruling. (Attached.) The plaintiffs' objection is that neither the ruling, the order, nor the judgment contain any findings of fact, conclusions of law, or other reasoning that would allow the plaintiffs to evaluate whether an appeal is appropriate.

<u>There is no Evidence of Bad Faith as is Required by §78-27-56</u>. The court has articulated no facts evidencing the Chipmans acted in bad faith. The plaintiffs do not believe there are any such facts. They do not believe they acted in bad faith. They filed suit against the defendants to clear title to property that has been owned by their family for decades. The plaintiffs worked for many months

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trying to obtain from the defendants the documents necessary to clear title to the plaintiffs' land. Only after many months of fruitless negotiation with the defendants did the plaintiffs file suit. Even after a written demand letter detailing the extreme weakness of the defendants' legal position, the defendants would not respond or provide the required documents. The plaintiffs had no option but to file litigation to clear the title on their property. The Chipmans patiently acted in good faith for many months trying to obtain clear title to their property short of litigation, and in filing suit they were similarly acting in good faith.

The naming of the Andersons as defendants was not an action prompted by or evidence of bad faith. As the minutes of the American Fork Planning Commission reveal, there was a dispute between the Andersons and the Chipmans as to ownership of the land adjacent to the fence line. Demand letters were sent to the Andersons asking them to sign documents indicating they no longer claimed ownership of the Chipmans' land. The Andersons did not even respond. Instead, their mother-in-law adamantly asserted on their behalf that they would not relinquish control of that land short of litigation. Based upon the Andersons' silence and the representations of co-defendant Miller, the Chipmans named Andersons in the lawsuit. Once the Andersons, through their attorney, provided written documentation that the Andersons were no longer asserting interest in the disputed property, the Chipmans promptly dismissed the Andersons from the

litigation. These actions do not indicate bad faith on the part of the Chipmans.

Defendant Miller also claimed an entitlement to attorney's fees based upon the fact that she filed an answer in this case. The defendant filed an answer even though she was given four extensions of time to answer, the last one being given specifically so the plaintiffs and their attorney could discuss ways to resolve this issue short of continued litigation.

The Plaintiffs did not Advance Frivolous Litigation. The plaintiffs do not believe the actions they took resulted in frivolous litigation. They filed a complaint only after they had exhausted all other avenues over the course of many months. Similarly, they filed a motion for attorney's fees only in response to the defendants' motion for attorney's fees and sanctions. Admittedly there are no Utah cases holding that pre-litigation attorney's fees can be awarded pursuant to Section 78-27-56. But on the other hand, neither are there any Utah cases holding that pre-litigation attorney's fees can NOT be awarded pursuant to Section 78-27-56. Indeed, there are two ALR annotations citing numerous cases from other state and federal jurisdictions where pre-litigation costs have been awarded pursuant to statutes similar to Section 78-27-56. The plaintiffs cited numerous cases in support of their position while the defendants did not rebut the cases identified by the plaintiffs nor did the defendants cite other cases in opposition to the position advanced by the plaintiffs. The plaintiffs do not believe it is frivolous to

advance arguments recognized and discussed at length in ALR citations.

Attorney's Fees can Only be Awarded to the Prevailing Party. Utah Code Annotated Section 78-27-56 states: "In civil actions, the court shall award attorney's fees to a prevailing party . . . ." No where in the Utah Code or in Utah cases is there authority for awarding attorney's fees to the losing party. In this case the Chipmans are the prevailing party. They filed a complaint so they could obtain the quit-claim deed they were entitled to. They obtained that deed through the litigation and are thus the prevailing party. The defendants did not prevail on any substantive claim or counter-claim. As the losing party the defendants have no claim or right to attorney's fees.

An Award of Attorney's Fees Should be Made on the Basis of Findings of Fact Supported by the Evidence and Appropriate Conclusions of Law. Almost every Utah court faced with the issue of whether a trial judge must submit findings of fact and conclusions of law with an award or denial of attorney's fees has found that the trial judge should enter those findings and conclusions. For example, in Cabrera v. Cottrell, 694 P.2d 622, 625 (Utah 1985), the Supreme Court held that "attorney fees should be awarded on the basis of evidence and that findings of fact should be made which support the award." The Court of Appeals "has reversed attorney fee awards when the trial court failed to make appropriate findings of fact and conclusions of law." See, e.g., Saunders v. Sharp, 818 P.2d 574

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(Utah Ct. App. 1991). Similarly, in In re Grimm, 784 P.2d 1238 (Utah Ct. App. 1989), the Court of Appeals was compelled to remand the case to the trial court because of "[t]he absence in the record before us of findings and conclusions on the issue of attorney fees . . . ." Id. In this case, plaintiffs are unable to evaluate the appropriateness of an appeal without findings of fact and conclusions of law from this court.

Request for a Hearing or Written Explanation. Before this case comes to an end by way of a final judgment, the plaintiffs need some reasoning or other legal analysis the court's position on this issue. Alternatively, if the court would allow a hearing to explain the basis for the court's decision, then detailed written findings of fact and conclusions of law may be unnecessary.

In conclusion, the plaintiffs object to the proposed order and judgment in that neither the proposed order and judgment nor the ruling identify any facts or other basis for evaluating whether or not an appeal should be considered.

DATED this 15 day of September, 1995.

DUVAL HANSEN WITT & MORLEY, L.L.C.

Gordon Duval

GORDON DUVAL

5C

GORDON DUVAL -- No. 6532
DUVAL HANSEN WITT & MORLEY, L.L.C.
Attorney for Plaintiffs
110 South Main Street
Pleasant Grove, Utah 84062
Telephone: (801) 785-5350

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

CURTIS CHIPMAN and FAY CHIPMAN, Plaintiffs, vs. JANICE MILLER, DANA ANDERSON, and KIM ANDERSON. Defendants.	**PLAINTIFFS' REQUEST FOR A HEARING** Civil No. 950400145 Judge Guy Burningham

Before this case comes to an end by way of a final judgment, plaintiffs request a hearing to verify the basis of the court's decision.

DATED September 15, 1995.

DUVAL HANSEN WITT & MORLEY, L.L.C.

Gordon Duval
GORDON DUVAL

MAILING CERTIFICATE

I CERTIFY that a true and correct copy of **PLAINTIFFS' NOTICE OF OBJECTIONS TO THE PROPOSED ORDER AND JUDGMENT** was mailed, postage prepaid, September 15, 1995, to:

CRAIG SNYDER
120 East 300 North
Provo, UT 84606

FAY AND CURTIS CHIPMAN
1105 North 150 West
American Fork, UT 84003

SECRETARY

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

* * *

CURTIS CHIPMAN

Plaintiff,)

)

vs.) Civil No. 950400145

) HEARING TRANSCRIPT

)

JANICE MILLER)

)

Defendant.

BE IT REMEMBERED that on the 5th day of October, 1995, the HEARING in the above-entitled matter was taken by Video Tape before the Honorable Guy Burningham and was transcribed by Richard C. Tatton, a Certified Shorthand Reporter and Notary Public in and for the State of Utah at the Fourth Judicial District Court Building, Provo, Utah 84601.

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A P P E A R A N C E S

For the Plaintiff: Mr. Gordon Duval
Attorney at Law
110 South Main Street
Pleasant Gorve, Utah 84062

For the Defendant: Mr. Craig Snyder
Attorney at Law
Provo, Utah 84601

P R O C E E D I N G S

THE COURT: We are making our record on video tape today. We are here on File Number 950400145, Curtis Chipman vs. Janice Miller. We are here on Plaintiff's let's see, there is an objection to a ruling and order and then requested a hearing. From the memo, it sounds like you want to reargue what we did before. Why don't you come

here and state exactly what it is, Mr. Duval, you would like this court to do or to consider.

MR. DUVAL: Thank you, Your Honor. We understand what the court ruled but just didn't understand why. Before I could accurately advise my client onto what their options were, I needed to understand some of the Findings and Conclusions that led to the court's analysis and eventual ruling.

We did not believe there was evidence in the file of bad faith nor that the defendants had prevailed nor did we think that the arguments that were advanced were frivolous . I have here, these are the ALR Citations, and cases that we have researched in preparing the memos. There is a significant volume of law, not necessarily from this state, but other states and we just need to understand the basis for the court's ruling.

THE COURT: I think I can try to do that for you. Mr. Snyder any comment you wanted to make?

MR. SNYDER: I don't think there is any comment I would make other than what I have indicated in the briefs that I submitted and the response that I made to Mr. Duval's original pleadings and motions.

THE COURT: As I read 78-

MR. SNYDER: 27-56.

THE COURT: Well, yes, but before that. 78-40-3

in the defendant's disclaimer of any interest in the property, the statute says that plaintiff cannot recover costs. And based on that and I understand the argument that you made, well, that is because they said that they weren't going to claim any interest, we ended up having to go ahead and file a lawsuit anyway. This statute doesn't make a differentiation whether you file a lawsuit or not. The fact that they may have again taking your argument that I recall you having made to me, is that they drug their feet and caused you problems and so you filed a lawsuit.

However, their answer did disclaim any interest in the property. And under 78-40-3 that precluded you from getting any costs. So when you filed your motion for attorney fees and costs, and I recall the, I think it was an affidavit in support of that, there were over $3,000.00 worth of attorney fees and costs on this thing which did seem excessive to the court.

I guess one of the compelling arguments that was persuasive to me was in, I think it was the counter affidavit of Mr. Snyder, if I can find that. It was filed with the court on June the 12th of 1995, on the fourth page of that in what is Paragraph 6 Sub "J", he pointed out, as he went through your affidavit and I did as well. On April the 11th of 1995 you, Mr. Duval, spent

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$25.00 worth of time or approximately 12 minutes in your hourly billing reviewing the merits for the claims for attorney fees. This is a parenthetical note of Mr. Snyder. He says that he found it extremely interesting that you spent approximately 12 minutes making a legal determination that you are entitled to attorney fees and costs totalling more than $3300.00.

As we got here and I looked at 78-40-3 it appeared to me that you wouldn't be entitled to the costs associated with this matter. It was on that basis and on the motion and cross motion for attorney fees under 78-27-56 that because I did award some attorney fees. And let me explain how I arrived at those attorney fees.

Mr. Snyder in his affidavit for attorney fees in Paragraph 8, I didn't allow him fees for the conference and review pleadings that occurred in March nor pleadings that were prepared in April. The only fees I allowed him were in May which was the opposition that he had to file to your motion for attorney fees, and for his review of the pleadings and proofing of the brief which was May 5th of 1995. The memorandum that he submitted which was also May the 5th of 1995 and then the pleadings to reply to the motion which was on the 8th of May of 1995.

If my calculations are correct, those four numbers were $165.00, $93.75, $69.00, $156.25, and when I totalled

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those they added up to $484.00, and so because he was the prevailing party on that motion, I gave him simply the fees that were generated to respond to that motion, nothing else. So that was the basis of my ruling. Normally on motions, I don't make findings of fact and conclusions of law. That is all they are is motions. Many times they are just overruled or sustained. That is how I arrived at it.

In fairness and if you want to have that articulated in some findings since I did ask Mr. Snyder to prepare those, he could augment that, make the findings that I have just made and then submit them to you for approval as to form, and to the court for signature. I think then you would have anything that you may need, at least, as far as my basis for reaching the conclusions I did, if you decide you want to appeal it for $480.00 attorney fees.

MR. DUVAL: Thank you, Your Honor, that would be helpful. I think the reference to the one citation for 25 minutes, I have four different memos to law clerks before the complaint was ever filed regarding whether or not they would be entitled to attorney fees. So there was significant research. And matter of fact,part of that $3,000.00 was research on the issue of attorney fees before. So I think the issue of the statute, I don't know that there is any cases that show that we were not seeking relief

pursuant to a statute, We were seeking relief pursuant to the bad faith statute and not a specific statute relating to a quiet title action. So that is why while that statute would apply to quiet title actions, it is not even what we filed. We asked for a declaratory judgment on a boundary line issue, boundary by acquiescence and so that - -

THE COURT: Well, but the affect of that at least my interpretation of that is you were attempting to quiet title in the property that is in dispute. When the defendant backed off and said we are not claiming any interest in it, you know, you can have it, that is what that statute really is designed, I think, to do. It is to save you money and time from having to go ahead and fight about it once you filed your pleadings.

Now if I have misunderstood anything either one or both of you ought to correct me.

MR. DUVAL: Why I think in a quiet title action there is that element of quieting title as to two parties but there is also to all the world if anybody has an interest in that land. So it would be unfair to assess attorney fees to all the world when maybe a party is not affirmatively, aggressively asserting an interest in the land, as was the case with this particular person. So I think that there are different policy reasons between why in a quiet

title statute they would say that you can't get attorney fees against everybody that you may have named because they may not be asserting an interest in that,

THE COURT: Well, yes I understand that as well. As I went through the memorandum or the affidavits, excuse me, the affidavit of attorney fees, you know I kind of asked myself was all of this necessary in light of what was occurring must the answer had been filed. And so I understand that a lot of time was spent in preparation of this but in light of that statute that was the basis that I wouldn't award attorney fees to you as a prevailing party because you didn't have to fight for it very hard, and that is what the statute says.

MR. SNYDER: I think, just to add. This is clearly a quiet title action. Paragraph 20 of the complaint says that title to the disputed land should be quieted to the plaintiffs under the doctrine of boundary by acquiescence. It is clearly a quiet title action whatever theory you intend to quite the title by whether it is acquiescence, whether it is some other theory, you are quieting title to the property. The statute clearly applies and you know two of these parties have never claimed an interest to the property that is in question, never have and never did. Mrs. Miller did but then after consulting with counsel determined that claim was not appropriate and withdrew it.

Mr. Duval was informed of that.

THE COURT: Anything else Mr. Duval that you can go ahead and make your record today. I am going to have Mr. Snyder make the findings that I have indicated today.

MRS. CHIPMAN: Can I say anything at all?

THE COURT: Why don't you consult with Mr. Duval. This isn't an evidentiary hearing today.

MRS. CHIPMAN: Such lies I can't believe it. She just give up that property, give up that property with no fight. I fought her for a whole year.

MR. DUVAL: I think we understand the basis of the court's ruling.

THE COURT: That was the reason, again I didn't even give Mr. Snyder anything as far as his defense for preparation of those matters on your complaint, but only as to him responding to to your motion for the attorney fees. I felt that he was the prevailing party on that motion. So under 78-27-56 I thought was well taken. I did not feel like your claim for attorney fees was well taken in light of 78-40-3.

MR. DUVAL: Your ruling mentions 27-56 is that also then a finding of bad faith on the Chipman's part and there was - -

THE COURT: 27-56 is the prevailing party statute and I - -

MR. SNYDER: The claim was not brought or asserted in good faith is what it says.

THE COURT: I didn't think it was in light of 78-40-3. I just didn't think it was well taken at all and let me read that.

I felt like it was without merit. In light of 78-40-3 I don't think it was asserted in good faith. So that was the basis for the ruling. Like I say let's give the rationale so that you can argue that to someone and somebody else will tell me.

MR. SNYDER: Thank you, Your Honor.

MR. DUVAL: Thank you.

(WHEREUPON, this hearing was concluded)

ment in that regard is reversed. The Court of Appeals decision is affirmed in all other respects. As is their remainder of the judgment.

GIVAN, C.J., and HUNTER and PRENTICE, JJ., concur.

PIVARNIK, J., not participating.

ANNOTATION

ATTORNEYS' FEES: OBDURACY AS BASIS FOR STATE-COURT AWARD

by

Daniel P. Jones, J. D.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

20 Am Jur 2d, Costs § 72; 22 Am Jur 2d, Damages §§ 165, 168

Annotations: See the related matters listed in the annotation.

2 Am Jur Pl & Pr Forms (Rev), Attorneys at Law, Forms 111.1, 193

7A Am Jur Pl & Pr Forms (Rev), Costs, Forms 91-93

3 Am Jur Legal Forms 2d, Attorneys at Law, Ch. 30

2 Am Jur Proof of Facts 253, Attorneys' Fees

1 Am Jur Trials 93, Setting the Fee

US L Ed Digest, Attorneys' Fees § 1; Costs and Fees §§ 21, 32-34

ALR Digests, Attorneys' Fees §§ 28-38; Costs and Fees § 30; Damages §§ 393-393.5

L Ed Index to Annos, Attorney and Client; Costs and Fees; Damages

ALR Quick Index, Attorneys' Fees; Costs of Actions, Damages; Obduracy

Federal Quick Index, Attorneys' Fees; Costs and Fees; Damages; Obduracy

VERALEX™: Cases and annotations referred to herein can be further researched through the VERALEX electronic retrieval system's two services, **Auto-Cite®** and **SHOWME™**. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

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Attorneys' fees: obduracy as basis for state-court award

INDEX

TABLE OF JURISDICTIONS REPRESENTED

Consult POCKET PART in this volume for later cases

I. Preliminary matters

§ 1. Introduction

[a] Scope

This annotation collects and analyzes the state cases discussing the allowance of an award of attorneys' fees on the basis of "obduracy" or "obdurate" behavior or conduct by a party or counsel to a party. Although terms such as "bad faith," "vexatiousness," "wantonness," and the like may be used by courts discussing the "obduracy" or "obdurate behavior" concept, only those state cases dealing specifically with "obduracy," or conduct or behavior described as "obdurate," are collected.[1]

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments bearing upon this subject. Since these are discussed herein only to the extent that they are reflected in the reported cases within the scope of this annotation, the reader is advised to consult the appropriate statutory or regulatory compilations.

[b] Related matters

Allowance of attorneys' fees in mandamus proceedings. 34 ALR4th 457.

What constitutes bad faith on part of insurer rendering it liable for statutory penalty imposed for bad faith in failure to pay, or delay in paying, insured's claim. 33 ALR4th 579.

Authority of trial judge to impose costs or other sanctions against attorney who fails to appear at, or proceed with, scheduled trial. 29 ALR4th 160.

Award of attorneys' fees out of trust estate in action by trustee against cotrustee. 24 ALR4th 624.

Authority of divorce court to award prospective or anticipated attorneys' fees to enable parties to maintain or defend divorce suit. 22 ALR4th 407.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party. 9 ALR4th 1144.

Award of damages for dilatory tactics in prosecuting appeal in state court. 91 ALR3d 661.

Right of party who is attorney and appears for himself to award of attorney's fees against opposing party as element of costs. 78 ALR3d 1119.

Validity of statute allowing attorneys' fees to successful claimant but not to defendant, or vice versa. 73 ALR3d 515.

Construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorneys' fees. 68 ALR3d 209.

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims. 66 ALR3d 1115.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party." 66 ALR3d 1087.

Validity and construction of statute or rule allowing attorneys' fees to out-of-state defendant successfully defending suit brought in state. 51 ALR3d 1336.

Allowance of attorneys' fees in civil contempt proceedings. 43 ALR3d 793.

Attorneys' fees or other expenses of litigation as element in measuring exemplary or punitive damages. 30 ALR3d 1443.

Attorneys' fees as element of damages in action for false imprisonment or arrest, or for malicious prosecution. 21 ALR3d 1068.

Attorneys' fees incurred in litigation with third person as damages in action for breach of contract. 4 ALR3d 270.

Items of costs of prosecution for which defendant may be held. 65 ALR2d 854.

Allowance of attorneys' fees in, or other costs of, litigation by beneficiary respecting trust. 9 ALR2d 1132.

Award of counsel fees to prevailing party based on adversary's bad faith, obduracy, or other misconduct. 31 ALR Fed 833.

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Speiser, Attorneys' Fees (1973).

Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation? 49 Iowa L Rev 75.

1. For a discussion of federal court awards of attorneys' fees to prevailing parties based upon an adversary's bad faith, obduracy, or other misconduct, see the annotation at 31 ALR Fed 833.

Mallor, Punitive Attorneys' Fees for Abuses of the Judicial System, 61 NC L Rev 613 (1983).

§ 2. Summary and comment

[a] Generally

The term "obdurate" has been defined by Webster's dictionary as "stubbornly persistent in wrongdoing."[2] In its legal sense, the term is rarely defined with such precision. Cases utilizing the term, or in its noun form "obduracy," tend to freely substitute as synonymous terms such as "bad faith," "vexatiousness," wantonness," "oppressiveness," and even "obstreperousness."[3] Though a precise legal definition of obduracy is lacking, the state cases collected connote generally a degree of stubbornness, obstinacy, or refusal to cooperate by a litigant or his attorney which might warrant as a sanction an award of attorneys' fees to the opposing party.

The general rule followed throughout the United States, known as the "American rule," states that a litigant has no inherent right to recover attorneys' fees, whether as costs or as damages, from an opposing litigant, in the absence of statute, rule of court, or agreement providing otherwise.[4] An exception to the American rule has been recognized by state courts under the circumstances of obduracy outlined above.

A few courts have held that obduracy arising in conduct preceding litigation will not support an award of attorneys' fees under the obduracy exception (§ 3), reasoning that prelitigation conduct giving rise to a potential cause of action or lawsuit cannot in itself constitute obduracy. Many courts, however, have identified specific conduct by a party which occurred prior to the filing of suit as a possible basis for an award of attorneys' fees to the adversary (§ 4). Courts have awarded attorneys' fees to a prevailing party based upon a showing that the adversary wrongfully and in bad faith refused to pay a monetary claim, some reasoning that litigation should have been unnecessary to claim a clearly defined entitlement, though fees were not awarded when the appellate court was not presented a proper factual record demonstrating obduracy (§ 4[a]). Fees were not awarded in a case in which an opposing party allegedly misallocated municipal funds, because no fraudulent purpose for the accounting errors was evident (§ 4[b]). Obduracy in prelitigation conduct warranting an award of attorneys' fees was not found in a case in which a party failed to establish legal title to an easement before exercising rights of ownership, because bad faith or oppressive and vexatious conduct were not shown (§ 4[c]). Though obduracy has been alleged in cases of failure by a government official to enforce statutory rights, state courts have not awarded attorneys' fees based upon obduracy under either state law (§ 4[d]) or the federal civil rights statutes (§ 15). Mere termination of an employment contract, absent a showing of bad faith, did not constitute sufficient obduracy to allow an award of fees to the terminated employee (§ 4[e]).

State courts addressing the issue more often have found obduracy warranting imposition of attorneys' fees in conduct occurring during litigation, as opposed to conduct occurring before the litigation process begins. Courts have held that the obduracy exception is an appropriate remedy to compensate a defendant dragged into baseless litigation through prosecution of a meritless lawsuit, though mere allegations that particular claims were meritless or baseless did not suffice to justify an award as a sanction unless obduracy in presenting the claims was also shown (§ 5). Similarly, an award of attorneys' fees based on obduracy has been made against an attorney who knowingly argued entirely meritless defenses, but was denied in a case in which a party presented an unfounded defense, but was not shown to have done so in bad faith (§ 6). Dismissal of a condemnation proceeding by the condemnor did not warrant an award of fees to the party whose property was threatened with condemnation, when the dismissal was not made in bad faith (§ 7). Failure of a plaintiff to dismiss a codefendant from a lawsuit, when no evidence indicated liability by the codefendant for alleged negligence to the plaintiff, supported an award of attorneys' fees under the obduracy exception (§ 8). State courts have held that mere objections to preliminary motions will not constitute obduracy (§ 9), though the cumulative effect of a number of objections and motions resulting in the needless protraction of litigation has been held to justify an award of attorneys' fees under the obduracy exception (§ 10). Bad-faith obstruction of a series of court orders has been sanctioned by an award of attorneys' fees under the obduracy exception (§ 11). The mere fact that parties to litigation eventually settled between themselves, when no bad faith was evident, did not justify an award of attorneys' fees (§ 12[a]), though a clearly unreasonable and obdurate refusal by an attorney to sign a settlement order has resulted in an award of fees to the opponent (§ 12[b]).

The filing of a frivolous appeal could constitute obduracy within the meaning of the exception to the American rule, though state courts addressing the question have not awarded fees, finding that the appeals were not frivolous (§ 13). However, an attorney who misstated facts in an appellate record, thereby consuming the time of the court and opposing counsel, has been sanctioned by an award of fees to the opponent (§ 14).

A few state courts have explored the relationship of the obduracy concept to other conceptual bases supporting an award of attorneys' fees to a prevailing party. The obduracy exception, as utilized by the federal courts in making attorneys' fees awards made under the federal civil rights statutes, was held not applicable to allow an award of fees in state court when state law did not allow such awards (§ 15),

2. Webster's New Collegiate Dictionary (1976).

3. The latter term appears in Stech v Panel Mart, Inc. (1982, Ind App) 434 NE2d 97, § 4[a]. The others appear with regularity throughout the cases collected.

4. See 1 Speiser, Attorneys' Fees, §§ 12.3 and 12.4 (1973).

and a state court has held that a showing of obduracy is unnecessary to support an award of attorneys' fees based upon the private attorney general exception to the American rule (§ 16).

[b] Practice pointers

As a matter of broad public policy, advocates of shifting attorneys' fees contend that litigants will be deterred from wasting limited judicial resources and congesting the courts with baseless litigation by the threat of having to pay the adversary's counsel fees. The counterargument states that a litigant with a potentially meritorious claim or defense should not be punished merely for bringing or defending a lawsuit, because rights of free access to the courts may be chilled.[5] Attorneys arguing for or against application of the obduracy exception to the American rule in a particular case might consider directing the court's attention to the broader underlying policies involved.

Counsel arguing on appeal that an award of attorneys' fees should have been allowed by the trial court due to obdurate behavior by the adversary in the proceedings below, or prior to litigation, should note that the decisions state that the question of obduracy is a factual determination. For this reason, counsel should preserve the issue for appeal and be prepared to point to specific trial court findings of fact, such as findings that the adversary protracted litigation, abused the judicial process, or otherwise demonstrated bad faith giving rise to obduracy, when assigning trial court refusal to award attorneys' fees as error. Though the appellate court might remand for such a factual determination,[6] it might instead simply affirm the trial court denial of attorneys' fees.[7]

Although state courts discussing obduracy as a basis for an award of attorneys' fees sometimes have imposed such a sanction as part of the costs of litigation and sometimes as damages, as a practical matter the courts have attempted no distinction in categorizing the awards on this basis. However, at least one court has pointed out that because an award of attorneys' fees as damages made under the obduracy exception is punitive in nature, an assessment of attorneys' fees would not be proper against a party, such as a government entity, which is not liable for punitive damages under state law.[8]

Counsel should note that courts have held an attorney for a party personally liable for payment of the attorneys' fees of the opposing party, when the court determined that actions taken by the attorney in the conduct of litigation constituted obduracy.[9] Obduracy by an attorney in bringing or defending a lawsuit also could be sanctioned under the Model Rules of Professional Conduct. Disciplinary Rule 7-102(A)(1) provides that an attorney should not "[f]ile a suit, assert a position, [or] conduct a defense . . . on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Disciplinary Rule 7-102(A)(2) ameliorates this rule to the extent that a lawyer is allowed to make a claim or defense unwarranted by existing law "if it can be supported by good faith argument for an extension, modification, or reversal of existing law." Clearly, however, a trial court finding that an attorney obdurately or in bad faith presented a baseless claim or defense could warrant professional discipline.

II. Obduracy in prelitigation conduct

§ 3. View that obduracy in prelitigation conduct cannot support award of attorneys' fees

Although many of the cases collected within this annotation make no distinction between obdurate conduct occurring before the filing of suit and obdurate conduct occurring after the filing of suit, the following cases have held explicitly that obdurate conduct occurring before litigation cannot support an award of attorneys' fees to a party under the obdurate behavior exception to the American rule.

The "obdurate behavior" exception, which would otherwise allow an award of attorneys' fees as an element of damages, was held inapplicable to conduct preceding the commencement of litigation in E. F. Hutton & Co. v Anderson (1979) 42 Colo App 497, 596 P2d 413. The plaintiff had been awarded punitive damages and attorneys' fees as part of a judgment in a civil securities fraud lawsuit, in which the defendant was alleged to have shown a willful, malicious, and reckless disregard of the plaintiff's rights in paying on an account with bad checks. In reviewing the defendant's claim on appeal that attorneys' fees should not have been awarded, the court stated that in the absence of a statute or contractual agreement, attorney's fees ordinarily are not recoverable as an element of damages in a tort or contract action. Noting that the plaintiff conceded that no contractual arrangement or statute authorized the award of attorneys' fees, the court found that the plaintiff relied on the "obdurate behavior" exception to the general rule of no attorneys' fees. The court described the exception as allowing the award of attorneys' fees if the losing party has acted in bad faith or for oppressive reasons. Finding, however, that the exception applied only when the bad-faith conduct alleged related to the prosecution or defense of the action, and that it was not contended that the defendant had made his defense in bad faith, the court held that it was error for the trial court to award attorneys' fees, and reversed the judgment granting the fees.

5. See Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation? 49 Iowa L Rev 75.

6. See Upson v Board of Trustees (1984) 124 NH 787, 474 A2d 582, § 4[a].

7. See, for example, Griffin v New Hampshire Dept. of Employment Secur. (1977) 117 NH 108, 370 A2d 278, § 4[a].

8. See Re Wardship of Turrin (1982, Ind App) 436 NE2d 130, § 4[a].

9. See, for example, Simmons v Philadelphia (1984) 80 Pa Cmwlth 354, 471 A2d 909, § 6.

In reviewing an award of attorneys' fees to a plaintiff who had been granted an injunction enjoining the erection of a fence, the court in Kikkert v Krumm (1985, **Ind**) 474 NE2d 503, 49 ALR4th 819, above, held that intentional or illegal conduct that gives rise to a cause of action is not obdurate behavior within the meaning of the exception to the American rule requiring each party to the litigation to pay his own attorneys' fees. The state Supreme Court first noted that attorneys' fees are not allowable in the absence of a statute or in the absence of some agreement or stipulation specifically authorizing such fees, and noted that the same rule applied in courts of law and courts of equity. However, the court recognized that other jurisdictions had carved out an exception to the general rule through the use of the court's equitable powers when a party acted in bad faith. Stating that the case represented the first time the court had considered the obdurate behavior exception to the American rule, the court defined the obdurate behavior exception as a protective measure which operates to help preserve the integrity of the judicial process. An attorney's fee award made under the obdurate behavior exception, according to the court, was punitive in nature and designed to reimburse a prevailing party who has been dragged into baseless litigation and as a consequence subjected to great expense. The Supreme Court added that the obdurate behavior exception came into play only at the time a party files a knowingly baseless claim or at the time a party discovers that the claim is baseless and fails to dismiss it. The court stated that conduct such as this would constitute obdurate behavior upon a trial court's finding that the behavior was vexatious and oppressive in the extreme and a "blatant abuse of the judicial process." Describing the underlying lawsuit as an example of the classic property dispute, and stating its belief that the plaintiffs and defendants disputed a legitimate claim of right, the court found the obdurate behavior exception, as a remedy for defendants who are dragged into baseless litigation, inapplicable. Also, the court noted that the allegedly obdurate behavior had occurred before the filing of the lawsuit, and held that intentional or illegal conduct giving rise to a cause of action is not obdurate behavior, but is merely conduct that may form the basis of a potential lawsuit. The award of attorneys' fees to the plaintiffs was therefore held to be error and the judgment was reversed in that regard.

The court in Dotlich v Dotlich (1985, **Ind App**) 475 NE2d 331, held that the obdurate behavior exception to the American rule did not apply to allow an award of attorneys' fees based upon obdurate conduct preceding a lawsuit. The underlying lawsuit was a shareholder's derivative action, and the directors of a corporation appealed a court order directing them to reimburse the corporation for its attorneys' fees. The appellate court noted that the jurisdiction generally followed the American rule, prohibiting an award of attorneys' fees against a losing party, absent a statute or rule to the contrary. However, the court noted three exceptions to the

American rule—the obdurate behavior, common fund, and private attorney general exceptions. The court defined the obdurate behavior situation as one allowing the courts to use their equitable powers to impose costs on defendants who behaved in bad faith, and held that the obdurate behavior exception was the only one that conceivably could apply. Relying upon Kikkert v Krumm (1985, **Ind**) 474 NE2d 503, above, for the proposition that the exception provides a remedy for defendants dragged into baseless litigation, the court held that the obdurate behavior alleged—refusal of the corporate directors to convey property back to the corporation—occurred before the suit was instituted, so was not obdurate behavior within the meaning of the exception. Such conduct, according to the court, merely formed the basis of the lawsuit.

In reviewing a dispute over enforcement of a settlement agreement arising out of an eminent domain proceeding, the court in White v Redevelopment Authority of McKeesport (1982) 69 **Pa** Cmwlth 307, 451 A2d 17, held that a statute awarding attorneys' fees to a party when the other party exhibited obdurate conduct during the pendency of a suit did not apply to conduct preceding the filing of suit. The local redevelopment authority and the petitioners had entered into an agreement concerning condemnation of the petitioners' business and reimbursement for relocation expenses. When the redevelopment authority made no payments after 2 years, the petitioners petitioned the court to enforce the settlement, and requested an additional attorney's fee for their efforts expended in obtaining payment under the agreement. The appellate court stated the general rule that in the absence of a private agreement or statutory provision to the contrary, each party to a lawsuit must pay his own attorneys' fees. Finding that the settlement agreement made no mention of the additional attorney's fee award sought by the petitioners, and that the applicable eminent domain code did not authorize such an award, the court noted that the petitioners alleged that the redevelopment authority had been malicious, arbitrary and vexatious in delaying payment under the settlement agreement. The petitioners, according to the court, relied upon a section of the state judicial code that entitled a participant in litigation to receive an attorney's fee as a sanction against another participant "for dilatory, obdurate or vexatious conduct during the pendency of a matter." The court held that the conduct of the redevelopment authority in not paying the amounts agreed upon did not take place during the pendency of the "matter" concerning the agreement, because no "action" arose with respect to the settlement agreement until the petitioners filed their petition. Also, the court noted that delay in making payment under the agreement was not "dilatory, obdurate or vexatious conduct" relative to the underlying eminent domain proceedings. Stating that it could "by no means applaud the Authority's conduct relative to its agreement," the court held that nevertheless an award of attorneys' fees could not be made under the state statute, so

the trial court order denying relief was affirmed.

§ 4. View that obduracy in prelitigation conduct can support award of attorneys' fees

[a] Refusing to pay monetary claim

In the following cases, prelitigation refusal by a party to pay a monetary claim was held by the courts to constitute obdurate behavior such as would support an award of attorneys' fees made under the obduracy exception.

In reviewing an award of attorneys' fees made under the obdurate behavior exception, the court in Lystarczyk v Smits (1982, Ind App) 435 NE2d 1011, held that the jury reasonably could have determined that the defendant had practiced oppression, fraud, or bad faith in refusing to make payment under a contract, thereby justifying the award. The underlying suit arose from breach of a construction contract for construction of a house. After a jury verdict in favor of the plaintiff contractor, the defendant appealed the award of damages and attorneys' fees. Stating that the jury was charged with weighing the evidence and determining the credibility of witnesses, and viewing the evidence and reasonable inferences to be drawn from it in the light most favorable to the defendant, the court found that the jury could reasonably have inferred that the defendant, in bad faith, attempted to delay payment to and withheld payment from the plaintiff. The court noted the general rule that each party to the litigation pays his own counsel fees, and the obdurate behavior exception, under which the court uses its equitable powers to impose costs on a defendant who has behaved in bad faith. However, finding that the proper amount of attorneys' fees to be awarded was not supported by sufficient evidence, the court reversed and remanded.[10]

In reviewing a lawsuit brought by a city employee to recover wages, the court in Logansport v Remley (1983, Ind App) 453 NE2d 326, held that failure of the city to pay an employee compensatory time was properly determined by the trial court to constitute obdurate behavior, and such behavior warranted an award of attorneys' fees to the employee. According to the court, testimony at the trial showed that the employee was dismissed by the city in order to avoid having to pay her compensatory time wages. Although the court noted that the evidence was conflicting as to whether the employee left her employment voluntarily or was fired, it held that the trial court, as a finder of fact, had made the inference that she was fired, and would not be reversed on this factual determination. Further, the court stated that it believed the conduct of city officials clearly constituted obdurate behavior. The court found that the employee was

10. More recent Indiana decisions indicate that the jurisdiction will no longer recognize prelitigation conduct as a basis for an award of attorneys' fees under the obduracy exception. See Kikkert v Krumm (1985, Ind) 474 NE2d 503, 49 ALR4th 819, and Dotlich v Dotlich (1985, Ind App) 475 NE2d 331, both at § 3.

fired after city officials discovered that she accumulated more compensatory time hours than they had previously contemplated, and apparently decided that the only expedient solution was to fire her. The court stated that it would not sanction conduct which amounted to an attempt by the city to alter the terms of a contract. Characterizing the award of attorneys' fees under the obdurate behavior exception as a "punitive imposition," the court held that the plaintiff was entitled to attorneys' fees under the obdurate behavior exception, and affirmed.[11]

The state Supreme Court in Harkeem v Adams (1977) 117 NH 687, 377 A2d 617, explicitly endorsed an award of attorneys' fees to a prevailing party based on displayed obduracy by the other party in prelitigation conduct. The plaintiff in the original suit had sought unemployment compensation benefits from the state department of employment security, and his benefits were denied. The plaintiff repeatedly attempted to claim his benefits by various administrative avenues, but was unsuccessful. A trial court eventually awarded the plaintiff the benefits he sought, and additionally awarded counsel fees in the amount of one-third of the recovery. On appeal, the defendant contended that the court could not award attorneys' fees in a case of bad-faith conduct, and that even if it could, the finding of bad faith was not properly made. The court stated the general rule that parties to litigation pay their own counsel fees, and reasoned that the rule sought to avoid penalizing a person for merely defending or prosecuting a lawsuit by entitling the opponent to collect attorneys' fees. Also, the court stated that the threat of having to pay an opponent's costs might unjustly deter those of limited resources from prosecuting or defending suits. Overriding considerations, however, would allow an award of attorneys' fees if appropriate to do justice and vindicate rights, according to the court. Citing numerous authorities, the court defined the bad-faith conduct necessary to justify an award of attorneys' fees as including situations in which a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons," conduct characterized as unreasonably obdurate or obstinate, or cases in which it should have been unnecessary for the successful party to have brought the action. The court further noted that an award of attorneys' fees on the basis of bad faith was appropriate in cases in which an individual was forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without judicial intervention. Under this ra-

11. The court defined the obdurate behavior required to bring the obdurate behavior exception into play as conduct of a party which is "vexatious and oppressive in the extreme," citing St. Joseph's College v Morrison, Inc. (1979) 158 Ind App 272, 302 NE2d 865, below. However, more recent Indiana decisions indicate that the jurisdiction will no longer recognize prelitigation conduct as a basis for an award of attorneys' fees under the obduracy exception. See Kikkert v Krumm (1985, Ind) 474 NE2d 503, 49 ALR4th 819, and Dotlich v Dotlich (1985, Ind App) 475 NE2d 331, both at § 3.

tionale, according to the court, the costs of what should have been an unnecessary judicial proceeding are merely shifted to the responsible party. Finding this rationale particularly appropriate in unemployment compensation actions, where an individual is often of limited means, the court held that an attorney's fee award would further the policy of providing needed access to the courts. Concluding that the plaintiff was clearly entitled to unemployment benefits, but was able to obtain them only by diligently pursuing his claim "through every available legal channel before he obtained vindication," the court held that the department of employment security acted contrary to both statute and established case law, which clearly established the plaintiff's claim as legitimate, in requiring the plaintiff to pursue litigation before paying his claims. Determining that the department had no valid reason for denying the plaintiff's benefits, the court stated that the department, in its obdurate pursuit of further fruitless litigation, "showed a callous disregard for the rights of the plaintiff," and that as a result, a needless drain was placed upon the resources of the state judicial system. The award of attorneys' fees against the department was affirmed.

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Alleged prelitigation refusal by a party to pay a monetary claim was held, in the following cases, not sufficiently proven to constitute obdurate behavior such as would support an award of attorneys' fees under the obduracy exception.

In reviewing an action to enforce a mechanic's lien, the court in St. Joseph's College v Morrison, Inc. (1973) 158 Ind App 272, 302 NE2d 865, held that conduct by a party must be "vexatious and oppressive in the extreme" before the court would award attorneys' fees under the obdurate behavior exception, and that this standard had not been met in the case before it. A contractor sought to recover attorneys' fees under the state mechanic's lien statute, but the court held that the statute did not apply to one not entitled to foreclose a mechanic's lien. Stating the general rule of the jurisdiction that each party to a lawsuit must pay his own counsel fees, that an award of attorneys' fees could not be made in the absence of a statute or agreement, and that this rule applied equally in courts of law and courts of equity, the court noted exceptions which had been carved out. The court found the exception applicable to the situation before it to be the obdurate behavior exception, under which courts could use their equitable powers to impose costs on defendants who behaved in bad faith. Holding that extraordinary circumstances other than mere failure to pay a disputed claim were necessary to establish bad faith under the obdurate behavior exception, and that a party's conduct must be "vexatious and oppressive in the extreme" before the court could impose special equitable sanctions, the court held that equity did not justify an award of counsel fees in the case before it, so reversed the trial court on this ground. However, the court noted that if a determination on remand showed that a valid lien existed, a statutory award of attorneys' fees would be appropriate.[12]

Finding that the trial court had not abused its discretion in denying a claim for attorneys' fees under the obdurate behavior exception, the court in Stech v Penal Mart, Inc. (1982, Ind App) 434 NE2d 97, held that it could not be said as a matter of law that the plaintiff corporation, in refusing to pay to the estate wages accrued by the deceased at his death, engaged in bad faith such as to make the obdurate behavior exception operable. The underlying suit arose when the plaintiff corporation sought to purchase shares of stock, under a stock purchase agreement, and the defendant refused to sell the stock at the tendered price. The corporation then filed a declaratory judgment action. The court defined the only relevant issue on appeal as whether the defendant should have been awarded attorneys' fees due to the obdurate behavior of the corporation in refusing to pay sums owed to her and to the estate, the salary and bonus accrued by the deceased prior to his death. Stating that the trial court found on the evidence no unreasonable delay giving rise to "obstreperousness" which would call for an award of attorneys' fees or punitive damages, the court noted the general rule that each party must pay his own attorneys' fees in the absence of a statute, agreement, or stipulation providing otherwise, and that an exception to the rule existed when a party acted in bad faith. However, the court defined "bad faith" as conduct vexatious and oppressive in the extreme. Trial court findings on the issue of bad faith were presumed to be correct and would not be disturbed if supported by evidence of probative value. Because the trial court had weighed the evidence and judged the credibility of the witnesses, and the issues presented were complex, the court found no abuse of discretion in the trial court refusal to award attorneys' fees, and held that as a matter of law, it could not be said that the corporation had acted in bad faith during the dispute. The case was affirmed in part, reversed in part, and remanded.[13]

A trial court award of attorneys' fees assessed under the obduracy theory against a state public welfare department was reversed by the court in Re Wardship of Turrin (1982, Ind App) 436 NE2d 130, because the court determined as a matter of fact that the department had not dragged foster parents into baseless litigation in refusing to pay monetary amounts incurred in caring for a foster child. The foster parents of a child afflicted

12. More recent Indiana decisions indicate that the jurisdiction will no longer recognize prelitigation conduct as a basis for an award of attorneys' fees under the obduracy exception. See Kikkert v Krumm (1985, Ind) 474 NE2d 503, 49 ALR4th 819, and Dotlich v Dotlich (1985, Ind App) 475 NE2d 331, both at § 3.

13. More recent Indiana decisions indicate that the jurisdiction will no longer recognize prelitigation conduct as a basis for an award of attorneys' fees under the obduracy exception. See Kikkert v Krumm (1985, Ind) 474 NE2d 503, 49 ALR4th 819, and Dotlich v Dotlich (1985, Ind App) 475 NE2d 331, both at § 3.

with cystic *fibrosis petitioned the* state for reimbursement of various monetary amounts incurred as expenses in foster care. As part of the petition, the foster parents sought reimbursement of their attorneys' fees, and the fees were awarded against the welfare department. Finding that no portion of the applicable dependent children statute granted attorneys' fees to foster parents, and finding no agreement between the parties providing for attorneys' fees, the court cited Cox v Ubik (1981, Ind App) 424 NE2d 127, § 8, for recognition of the obdurate behavior exception to the general rule that no attorneys' fees could be awarded absent statute or agreement. This exception, according to the court, was based on bad-faith actions by a party which were "vexatious and oppressive in the extreme." Noting that the bad faith exception was punitive in nature and was designed to reimburse a prevailing party dragged into baseless litigation and subjected to great expense, the court stated that mere refusal to pay a disputed claim was not considered bad faith, nor was the fact that a judgment was ultimately entered against a party. On its review of the record, the court found that the foster parents had not been dragged into baseless litigation, reasoning that they had withdrawn part of their original demand for compensation from the welfare department and that the court had denied their request for other expenses, and these denials were not challenged on appeal. Concluding that the welfare department's initial denial of the claims for reimbursement had merit and so was not baseless, the court determined that the obdurate behavior exception did not apply.[14]

In reviewing an action disputing entitlement to unemployment compensation benefits, the court in Griffin v New Hampshire Dept. of Employment Secure. (1977) 117 NH 108, 370 A2d 278, held that absent a finding that the defendant denied benefits in bad faith, attorneys' fees would not be awarded to the plaintiff under the obduracy exception. The plaintiff's unemployment compensation benefits were discontinued by the state, and he appealed. The trial court found that the plaintiff was entitled to the benefits, and awarded the plaintiff attorneys' fees to be paid by the state department of employment security, reasoning that an unemployed worker should not have to pay attorneys' fees in order to secure unemployment compensation to which he is entitled under law. Amici curiae to the appeal endorsed this argument, and also argued that the trial court possessed the equitable power to award attorneys' fees to put the innocent party in the same position in which he would have stood but for the other party's misconduct, and to discourage repetition of obdurate or bad-faith conduct by the other party. Finding no statutory authority for the payment of attorneys' fees to the plaintiff, the court stated that bad faith or obstinacy on the part of a party, manifested by its acting "vexatiously, wantonly, or for oppressive reasons," had been recognized as an exception to the general rule that attorneys' fees ordinarily would not be recoverable by the prevailing party. Noting a trial court finding that the employment department had "wrongfully withheld" benefits from the plaintiff, the court found no evidence that the department had acted in bad faith or that its conduct was "unreasonable, obdurate obstinacy." The court concluded that without such a finding of bad faith it need not decide whether bad faith would be recognized as an exception to the general rule that the parties to a lawsuit pay their own counsel *fees, and that it would not define* what conduct would constitute bad faith on the part of the employment compensation department if such an exception was recognized.[15]

Holding as a matter of law that no showing of obduracy sufficient to justify an award of attorneys' fees had been made, the court in Upson v Board of Trustees (1984) 124 NH 787, 474 A2d 582, held that no attorneys' fees should be awarded against a state agency that refused to pay retirement benefits. The underlying action involved the plaintiff's entitlement to a disability retirement. After holding that the plaintiff was entitled to these benefits, the court examined whether the plaintiff should be awarded costs and attorneys' fees due to the defendant's conduct in refusing to accept his application. Citing Harkeem v Adams (1977) 117 NH 687, 377 A2d 617, above, the court stated that an award of attorneys' fees on the basis of bad faith was appropriate when an individual was forced to seek judicial assistance to secure a clearly defined and established right, which should have been freely enjoyed without such intervention. However, the court held that in the case before it, the defendant's conduct could not be characterized as unreasonably obdurate or obstinate. The court additionally distinguished Harkeem by noting that the defendant in this case had not unnecessarily increased the plaintiff's costs by the use of dilatory tactics. Therefore, the court held that it was precluded from finding bad faith sufficient to justify an award of attorneys' fees as a matter of law, but remanded for a factual determination on the issue.

See State ex rel. Murphy v Industrial Com. of Ohio (1980) 61 Ohio St 2d 312, 15 Ohio Ops 3d 386, 401 NE2d 923, in which the court held that the party claiming attorneys' fees under the obduracy exception had not met his burden of proof in establishing any improper action by a state commis-

14. The court also held that because an award of attorneys' fees made on the basis of the obdurate behavior exception was punitive in nature, and the welfare department was a governmental entity, attorneys' fees, as punitive damages, could not be assessed, under the reasoning of State v Denny (1980) 273 Ind 556, 406 NE2d 240. Also, as noted above, more recent Indiana decisions state that obduracy giving rise to an award of attorneys' fees cannot be based upon prelitigation conduct. See Kikkert v Krumm (1985, Ind) 474 NE2d 503, 49 ALR4th 819, and Dotlich v Dotlich (1985, Ind App) 475 NE2d 331, both at § 5.

15. The state supreme later held that similar conduct by a state agency could properly support an award of attorneys' fees under the obduracy exception. See Harkeem v Adams (1977) 117 NH 687, 377 A2d 617, above.

sion. The state industrial commission had refused to consider an appeal denying workers' compensation benefits to the appellant. The Court of Appeals issued a writ of mandamus ordering the commission to reconsider allowing the appeal, and the appellant sought by motion an order granting attorneys' fees for the mandamus proceeding. The motion was overruled by the Court of Appeals. The state Supreme Court first noted the general rule that attorneys' fees were not recoverable as part of the costs of litigation in the absence of statutory authorization. The court further noted, without deciding, that the appellant attempted to recover attorneys' fees because the mandamus action was necessitated by "bad faith, vexatious, wanton, obdurate or oppressive" actions by the commission. Holding that the appellant had not borne of his burden of proof, the court refused to decide whether such actions, if proven, would result in an award of attorneys' fees. The judgment was therefore affirmed.

[b] Misallocating funds

Under the particular facts of the following case, prelitigation conduct which consisted of misallocating municipal funds was deemed not fraudulent in purpose, so insufficient to support an award of attorneys' fees to the plaintiff under the obduracy exception.

Finding no evidence in the record that the defendant had acted in bad faith, vexatiously, wantonly, obdurately or for oppressive reasons in misallocating municipal funds, the court in Oakwood v Makar (1983, Cuyahoga Co) 11 **Ohio** App 3d 46, 11 Ohio BR 79, 463 NE2d 61, held that an award of attorneys' fees under the obdurate behavior exception was unwarranted. The underlying action arose when a state auditor discovered discrepancies in the accounting books of a municipality. The responsible financial clerk was sued by the municipality for the financial deficiencies discovered, and the plaintiff municipality was awarded damages and attorneys' fees by the trial court, which the defendant appealed. The defendant contended that in the absence of statutory authorization, attorneys' fees could be awarded only when punitive damages were also awarded. The court stated that the current rule of the jurisdiction, as expressed in Sorin v Board of Education (1976) 46 **Ohio** St 2d 177, 75 Ohio Ops 2d 224, 347 NE2d 527, § 4[e], allowed the prevailing party attorneys' fees if the other party was found to have acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons. Although punitive damages often were awarded when these conditions existed, the court found no precedent stating that an award of punitive damages must be made prior to an award of attorneys' fees. However, the court held that no express finding had been made showing that the defendant acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons. Viewing the evidence as showing an informal system of bookkeeping had existed in the municipality, and that no formal accounting procedure had been set up, the court concluded that the defendant could be shown to have no fraudulent purposes in misallocating the municipal funds. Therefore, the court found the award of attorneys' fees unwarranted, and reversed.

See Re Estate of Pitone (1982) 297 **Pa** Super 161, 443 A2d 349, in which the appellate court did not reach the arguments of the appellees that they should be awarded reasonable counsel fees as part of taxable costs, because the appellant was obdurate in misusing estate funds. The appeal arose after a petition for reconsideration was denied by the Orphans' Court. After affirming the lower court denial, the court noted in a footnote that the appellees requested an award of reasonable counsel fees as part of taxable costs under a state statute allowing such fees as a sanction against another participant for dilatory, obdurate, or vexatious conduct during the pendency of the matter. According to the court, the appellees claimed that the appellant had improperly used funds of an estate in various ways. Without discussion, the court held that the claim for attorneys' fees had been waived because the appellees failed to preserve it in the lower court.

[c] Failing to establish legal right to property before assuming ownership

Under the particular facts of the following case, the court held that prelitigation conduct consisting of a failure to establish legal rights to property before assuming attributes of ownership over it did not constitute obduracy such as to warrant an award of attorneys' fees under the obduracy exception to the American rule.

Premature usage of a prescriptive easement by a party was held not the type of obdurate behavior or bad faith required to award attorneys' fees under the obdurate behavior exception in Umbreit v Chester B. Stem, Inc. (1978) 176 **Ind** App 53, 373 NE2d 1116. The defendants claimed to have acquired a prescriptive easement over land belonging to the plaintiff, and the plaintiff sought damages for trespass and an injunction. The trial court granted the injunction, and awarded attorneys' fees to the plaintiff. The appellate court, viewing the evidence in the light most favorable to the defendants, found that the defendants had not adequately established the exact location of their alleged prescriptive easement, nor had they identified their predecessors-in-title under whom they claimed continuous use, and that the evidence was conflicting as to the existence of a road across the plaintiffs' property at an earlier time. The court held that the evidence showed that the defendants therefore had failed to meet their burden of proving a prescriptive easement across the plaintiff's property before beginning bulldozing activities upon it. Turning to the question of the award of attorneys' fees, the court first noted the general rule of the jurisdiction that each party paid his own counsel fees, in the absence of a statute or agreement or stipulation stating otherwise. The court listed limited exceptions to the general rule, including the obdurate behavior exception, which the court defined as involving the use of the equitable powers of the courts to impose costs on defen-

dants who behaved in bad faith.[16] An indicator to the appellate court that the obdurate behavior exception might apply was the language of the trial court judgment, stating that the defendants had acted "without any color of title," that their acts were "shocking to the conscience of [the] Court and evidenced a reckless disregard of the consequences," and that attorneys' fees were awarded as a result. However, the appellate court stated that such language is associated with the award of punitive damages, not with an award of attorneys' fees. Noting that the plaintiff had neither requested attorneys' fees in his complaint nor alluded to them in trial briefs, the court cited St. Joseph's College v Morrison, Inc. (1973) 158 **Ind** App 272, 302 NE2d 865, § 4[a], for the proposition that a party's conduct must be vexatious and oppressive in the extreme before attorneys' fees could be awarded. The court held that although the evidence showed that the defendants had not yet acquired good title to the prescriptive easement in question when they began bulldozing, they had entered a binding purchase agreement with the prior owner of the easement before taking their actions, and had been assured by the prior owner that the alleged easement was a means of ingress and egress from the real estate. The court also noted that the deed executed following the purchase purported to include an easement along the roadway. Holding that the defendants might have acted prematurely and with undue haste, but that their actions did not rise to the level of obdurate behavior or bad faith required by the St. Joseph's College Case, the court found no justification for awarding attorneys' fees to the plaintiff. The judgment awarding attorneys' fees was therefore reversed and the case remanded.[17]

[d] Refusing to enforce statutory rights

Allegations that prelitigation obduracy took the form of governmental refusals to enforce statutory rights were not successful in the following cases, in which the courts denied recovery of attorneys' fees requested under the obduracy theory.[18]

A request for an award of attorneys' fees made under the theory

16. The court also defined the common fund exception as a defensive use of the equitable powers of the courts to ensure that the beneficiaries of litigation share the expense to prevent the unjust enrichment of "free riders," and defined the private attorney general exception as an offensive use of the equitable powers of the courts to ensure that a strong congressional policy was effectuated. However, the court found that neither the common fund nor the private attorney general exception applied to the case before it.

17. More recent Indiana decisions indicate that the jurisdiction will no longer recognize prelitigation conduct as a basis for an award of attorneys' fees under the obduracy exception. See Kikkert v Krumm (1985, **Ind**) 474 NE2d 503, 49 ALR4th 819, and Dotlich v Dotlich (1985, **Ind** App) 475 NE2d 331, both at § 3.

18. For cases in which government refusal to pay a monetary claim was contended to constitute a basis for an award of attorneys' fees under the obduracy exception, see § 4[a].

that a state official obdurately had refused to enforce statutory rights was denied without discussion in Scott v Family Ministries (1976, 2d Dist) 65 **Cal** App 3d 492, 135 Cal Rptr 430. The original action sought to restrain religious matching in adoption procedures as practiced by a private state-licensed adoption agency. After a judgment restraining the procedures denied attorneys' fees to the plaintiffs, they appealed, arguing in part that the "obdurate attitude" of the state attorney general in failing to protect the rights of adopted children entitled them to an award of fees. The court noted that the same issue was currently on appeal before the state Supreme Court, and that therefore it ordinarily would not pass on the issue until the Supreme Court had spoken, stating that extended discussion would be presumptuous. However, the court held that attorneys' fees historically had not been awarded in such situations, so affirmed the trial court denial of fees.

The obdurate behavior theory for an award of attorneys' fees as a sanction for refusal by school districts to allow the exercise of statutory rights was held to involve a factual determination of bad faith properly resolved by the trial court in Denver Asso. for Retarded Children, Inc. v School Dist. (1975) 188 **Colo** 310, 535 P2d 200. The underlying action, a mandamus, sought to have school districts comply with a statute concerning funding for the training of retarded and handicapped persons. On cross appeal, the plaintiffs contended that the District Court should have awarded them attorneys' fees. The court first noted that the issue of the awarding of attorneys' fees was a pure question of law, which could be decided on appeal by the appellate court. However, the court rejected the plaintiffs' claim that the defendants had acted obdurately and in bad faith in not complying with the state statute, stating that this theory involved a factual determination of bad faith. Because the plaintiffs had not moved for a new trial on this factual issue, the appellate court held that the issue was not properly before it. The district court's order denying attorneys' fees was affirmed.[19]

An award of attorneys' fees as exemplary damages was held not a possible recovery for a purported violation of federal and state statutes in Silverstein v Sisters of Charity of Leavenworth Health Services Corp. (1976) 38 **Colo** App 286, 559 P2d 716, 14 BNA FEP Cas 1066, 13 CCH EPD ¶ 11500. The plaintiff alleged employment discrimination based on her handicap against the defendant. The plaintiff also requested attorneys' fees as a general prayer in the complaint. The trial court ordered the dismissal of the statutory claims and struck prayers for exemplary damages and fees. On appeal, the plaintiff conceded that attorneys' fees generally were not recoverable as an item of damages

19. A later Colorado decision takes the position that obduracy relates to the prosecution or defense of an action, and not to prelitigation conduct. See E. F. Hutton & Co. v Anderson (1979) 42 **Colo** App 497, 596 P2d 413, § 3.

in the absence of express contractual or statutory liability. However, she contended that her claim fell within either the private attorney general or obdurate behavior exception to that rule. After rejecting recovery under the private attorney general rationale, the court defined the obdurate behavior doctrine as including situations in which the losing party is shown to have acted in bad faith or for oppressive reasons. The court stated that a related concept allowed an award of attorneys' fees as exemplary damages to punish behavior of an aggravated nature. However, because it determined that no exemplary damages could be recovered for a purported violation of the federal and state discrimination statutes, the court refused to award fees under the obdurate behavior exception.[20]

The court in State ex rel. Grosser v Boy (1976) 46 **Ohio** St 2d 184, 347 NE2d 539, held that the obdurate behavior exception to the American rule would not apply to sanction a party for refusing to allow the exercise of a right granted by state law. In the underlying action, the petitioners sought a writ of mandamus under which they would be allowed to inspect copies of high school records pursuant to a state statute. The petitioners eventually prevailed and sought, by motion in the Court of Appeals, an order awarding them costs and expenses, including reasonable attorneys' fees. The Supreme Court found no express provision for the recovery of attorneys' fees under applicable state statutes, and stated the general rule of the jurisdiction that in the absence of a statutory provision making attorneys' fees a part of costs, such fees could not be taxed. However, the court noted that the petitioners relied upon Sorin v Board of Education (1976) 46 **Ohio** St 2d 177, 347 NE2d 527, § 4[e], above, which allowed an award of attorneys' fees to be made when the opposing party has demonstrated bad faith or vexatious, wanton, obdurate, or oppressive conduct. Stating without discussion that this exception was not applicable to the case before it, the court affirmed the denial of an award of attorneys' fees.

[e] Terminating contract

Under the particular facts of the following case, the court determined that prelitigation conduct consisting of the termination of a school superintendent's contract by a school board would not give rise to an award of attorneys' fees to the superintendent, when the record reflected no bad faith by the school board in terminating the contract.

The obdurate behavior exception to the American rule was held not applicable to award attorneys' fees incurred by a school superintendent during an administrative proceeding he brought after a school board suspended his contract, because the school board was not shown to have acted in bad faith in seeking to terminate the superintendent's contract, in Sorin v Board of Education (1976) 46 **Ohio** St 2d 177, 347 NE2d 527. After the school board asked the superintendent to resign, brought charges against him, and then suspended him, the school superintendent demanded a public hearing under the relevant state statute. The school board terminated his contract retroactive to the date of his suspension after the hearing, and the Court of Common Pleas, on appeal, awarded the superintendent his full salary and contract benefits for the suspension period. The superintendent then sought repayment of attorneys' fees incurred during the hearing, and the trial court awarded attorneys' fees as costs and the Court of Appeals affirmed. The state Supreme Court first noted that the American rule did not permit a prevailing party to recover attorneys' fees, in the absence of statutory authorization, as part of the costs of litigation. Recognizing that commentators had criticized the American rule in recent years, the court stated that any departure from the rule, which it viewed as a deeply ridden policy, was a matter of legislative concern. Finding no applicable statutory provision providing expressly for the recovery of attorneys' fees as part of the costs of litigation, and refusing to read such an award into a statute governing termination of contracts with teachers, the court examined the obduracy exception to the American rule. This exception, according to the court, would grant an award of attorneys' fees to a party in actions in which the opposing party acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons.[21] The court found that precedent within the jurisdiction allowed a jury to consider and include reasonable attorneys' fees incurred by the plaintiff as a part of compensatory damages in tort actions involving fraud, malice, or insult. However, the case before it was distinguished as a lawsuit brought under a specific statutory provision addressing termination of a contract, as opposed to an action sounding in tort. Further, the court noted that the superintendent had not alleged that the school board acted in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons in seeking to terminate the contract. The court noted that neither the trial court nor the Court of Appeals had held that the school board acted obdurately, so held the obdurate behavior exception to the American rule inapplicable, and reversed the judgment awarding attorneys' fees.

See Carnegie Financial Corp. v Akron Nat. Bank & Trust Co. (1976, Summit Co) 49 **Ohio** App 2d 321, 3 Ohio Ops 3d 387, 361 NE2d 504, in which an award of attorneys' fees to the prevailing party was reversed because the record showed no evidence that the losing party acted obdurately. The underlying suit concerned the pri-

20. As noted above, the Colorado view has been modified since the date of this case. See E. F. Hutton & Co. v Anderson (1979) 42 **Colo** App 497, 596 P2d 413, § 3.

21. More recent Ohio Supreme Court decisions have tended to refer to the exception merely as the "bad faith" exception, without mentioning the specific terms "obduracy" or "obdurate behavior." See, for example, State ex rel. Kabatek v Stackhouse (1983) 6 **Ohio** St 3d 55, 6 Ohio BR 73, 451 NE2d 248, and State ex rel. Crockett v Robinson (1981) 67 **Ohio** St 2d 363, 21 Ohio Ops 3d 228, 423 NE2d 1099.

ority of liens on automobiles. The bank that financed the purchase of the automobiles was ordered by the trial court to pay damages and attorneys' fees to purchasers of the automobiles. Both holdings were reversed on appeal. Stating that attorneys' fees could be awarded only under a specific statutory provision or under the circumstances of bad faith or obduracy as stated by the court in Sorin v Board of Education (1976) 46 Ohio St 2d 177, 75 Ohio Ops 2d 224, 347 NE2d 527, above, the court held that because neither exception had been argued at the trial court or on appeal, attorneys' fees were not recoverable as damages.

III. Obduracy in conduct of trial litigation

§ 5. Prosecuting suit; baseless claim

The courts in the cases following recognized the appropriateness of regard of attorneys' fees under the obduracy exception to sanction a plaintiff bringing a meritless suit, holding that the exception provided a remedy for a defendant brought into baseless litigation.

In holding that attorneys' fees could not be awarded under the obduracy exception for prelitigation conduct forming the basis of the lawsuit, the court in Kikkert v Krumm (1985, Ind) 474 NE2d 503, 49 ALR4th 819 (for a fuller discussion of the facts underlying the lawsuit as evidence of obduracy, see § 3), stated that an award of attorneys' fees to a prevailing party is in the nature of a remedy for a party dragged into baseless litigation. The state Supreme Court first noted that attorneys' fees are not allowable in the absence of a statute or in the absence of some agreement or stipulation specifically authorizing such fees, and noted that the same rule applied in courts of law and courts of equity. However, the court recognized that other jurisdictions had carved out an exception to the general rule through the use of the court's equitable powers when a party acted in bad faith. Stating that the case represented the first time the court had considered the obdurate behavior exception to the American rule, the court defined the obdurate behavior exception as a protective measure which operates to help preserve the integrity of the judicial process. An attorney's fee award made under the obdurate behavior exception, according to the court, was punitive in nature and designed to reimburse a prevailing party who has been dragged into baseless litigation and as a consequence subjected to great expense. The Supreme Court added that the obdurate behavior exception came into play only at the time a party files a knowingly baseless claim or at the time a party discovers that the claim is baseless and fails to dismiss it. The court stated that conduct such as this would constitute obdurate behavior upon a trial court's finding that the behavior was vexatious and oppressive in the extreme and a "blatant abuse of the judicial process." Describing the underlying lawsuit as an example of the classic property dispute, and stating its belief that the plaintiffs and defendants disputed a legitimate claim of right, the court found the obdurate behavior exception, as a remedy for defendants who are dragged into baseless litigation, inapplicable.

The court in Dotlich v Dotlich (1985, Ind App) 475 NE2d 331, held that the obdurate behavior exception to the American rule against shifting of attorneys' fees provided a remedy for defendants dragged into baseless litigation, but was not available to a corporation that essentially prosecuted an action.[22] Relying upon Kikkert v Krumm (1985, Ind) 474 NE2d 503, above, for the proposition that the exception provides a remedy for a defendant dragged into baseless litigation, the court recognized that the exception could be utilized to award fees to a defendant under appropriate circumstances, though it was not available to award attorneys' fees to a party that prosecuted an action.

An action for false imprisonment filed against a state judge which was found by the trial court to be "frivolous, unreasonable and groundless" provided a proper basis for an award of attorneys' fees under the obdurate behavior exception, according to the court in Owen v Vaughn (1985, Ind App) 479 NE2d 83. The plaintiff was jailed for contempt by the judge, and later sued the judge for false imprisonment. The trial court entered summary judgment for the judge and awarded attorneys' fees against the plaintiff's attorneys under the provisions of a state tort claims statute. The award of attorneys' fees was later amended to make both the plaintiff and his attorneys liable for the fees under the judgment. After holding that the trial court had the discretion to award attorneys' fees against both the plaintiff and his attorneys, the court noted that as a general rule, attorneys' fees were not awarded within the jurisdiction in the absence of a contractual agreement or statute. The court stated, however, that exceptions to this rule had been carved out in recent years, one of which was the obdurate behavior exception. This exception was defined as operable in situations in which the prevailing party has been dragged into baseless litigation by the bad faith of the losing party. Though holding that the state tort claims act provided a proper basis for the award of attorneys' fees in the case before it, the court stated that even if the statute did not apply, the obdurate behavior exception would. Because the trial court made a specific finding that the plaintiff's action was "frivolous, unreasonable and groundless," and this finding was uncontested by the plaintiff, who offered no evidence or objections at the hearing on attorneys' fees, the court held that an award of attorneys' fees under the obdurate behavior exception would be proper. The judgment was affirmed.

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Based upon the particular facts of the following cases, the courts determined that an award of attorneys' fees could not be recovered under the theory that the opposing party prosecuted the lawsuit based upon meritless or groundless claims.

22. For the court's discussion of prelitigation conduct as obduracy and a fuller discussion of the underlying facts, see § 3.